(1) Supreme Court, U.S.
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No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1994**

J. DON ADAMS, et al.,
*Petitioners,*

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Whether the Sixth Circuit Court of Appeals violated fundamental concepts of Due Process by allowing the district court to exercise personal jurisdiction over putative class members, and foreclose them from future litigation and arbitration under a theory of "virtual representation" when the class was never certified under FED.R. CIV.P. 23 and the putative class members lacked the requisite minimum jurisdictional contacts with the forum.

II.

Whether the District Court's March 24 Order, Limiting Petitioners' Counsel's Communications with Petitioners, and the Circuit Court's failure to provide relief, violated Petitioners' Due Process and First Amendment Guarantees.

## LIST OF PARTIES

The parties to Sixth Circuit Court of Appeals were the Petitioners, the *Becherer* Plaintiffs, the SSG class (those other than Petitioners and the Becherer Plaintiffs), and the Defendants.

The Petitioners are: J. Don Adams, Donald J. Arceneaux (Mrs.), John Aucoin (& Mrs.), Edward R. Bassine, Anne T. Bassine, William R. Blaikie, Thomas H. Blundell, Robert J. Bruni (& Mrs.), Walter Bush, CCT & Co., a Partnership, James A. Campbell, Darrell R. Caudill, William A. Cherry, Ben Crebbs, Catherine Crebbs as General Partner of CCT & Co. and Administratrix of Estate of Robert W. Crebbs, Hugh W. Curfman, Michael S. Dwyer, Dick Dykes, L. Joe Edmondson, Francis C. Elkin, Myron Ellman (& Mrs.), W. James Everett, Richard G. Fadal, Lee Feinberg, Ozzie Fishman, Paula L. Fishman, Alan S. Fogg, Mary Lou Frazier, Francisco M. Gonzalez, Terry W. Grenat, Hem C. Gupta (& Mrs.), Paul D. Hansen, Keith Harvie, Betty Lee Harvie, Robert D. Hawley, Jr., Charles L. Henritzy, Curtis B. Herbert, Jr., Weldon Hiddleston, Dorothy M. Hiddleston, Les Hurrelbrink, Henry V. Jova, Estate of Dorothy Wells Knight c/o Steven M. Fatum, John E. Kohan, Bobby G. Lamb, Hazeltine Lamb, D. Rod Lee, Pat Maloney, Jr., Law Offices of Pat Maloney, P.C., Dan E. Martens, Susan J. Martens, William N. Mayo, Phillip W. McCollum, Earl McGavran, Edith E. McGavran, Alice S. McTurk, Ann Michael, Kyriakos Michaelides, Donald R. Mitchell, Fred W. Morgan, Jay Motler, Harold Mueller (Guarantor), Roger A. Mueller, Nancy W. Mueller, Claude L. Nabers, Leon Neiman, Carey B. Paul, Jr., Daniel N. Payton, III, H. Jane Payton, Jean A. Pitts, Gary L. Platner, Glen F. Raque, Personal Representative of the Estate of Robert G. Raque, Prabhakara Babu Ravi, M. Hobson Rice, Suraj P. Sancheti, Lee Santa Maria, Lula Santa Maria, Estate of Samuel Schenk by Mabel A. Schenk, Trustee, Sheldon Schreiberg, Arch H. Schrom, Thomas Q. Schultz, Ruth R. Schultz, Herbert R. Spencer, Anne R. Spencer, Tom Stanton, Robert Stern, Roxanne R. Stern, Gordon Stillwell, Therral Story, Kathy Story, Wellington K. Stretton (& Mrs.), Joshua M. Tharp, Jr., Pamela A. Threet, Jewel M. Threet, Ronald T. Ullenberg, Edward B. Walker, III, as General Partner of CCT & Co., Robert J. Wilder, Butz S. Wilder, Gerald L. Williams, Paul A. Williams, Hartmut Willinsky, Estate

of Anna M. Wood, Stephen F. Wood.

The *Becherer* Plaintiffs are Richard C. Becherer, Lawrence Milton Richard, Robert A. Horvath and Shirley L. Horvath, and Henry V. Denolf and Joann L. Denolf.

The SSG class, includes: Thomas L. Falls, Mary Helen Falls, Phairhoh Korn, Russel R. Steiner, Lalita J. Steiner, Edwin N. Hendon, Delores A. Hendon, Joseph Connone, James Swart, James M. Winey, Karen L. Winey, Norman Joe Owen, Isam Y. Balat, James E. Smith, Regina A. Smith, Gertrude M. Lacour, Robert H. Lacour, John C. Peevey, Faye H. Peevey, Harvey F. Williams, Michael Berkelhammer, James R. Morris, Hotel Partners #80, Ltd., Donald J. Eurice, Marion M. Eurice, Charlie Brown, John D. Toland, Christal N. Toland, Stuart V. Bowen, Margaret W. Bowen, Olga S. Defuentes, Gerda H. Place, Melvin L. Rubin, Harry W. Wallace, W.P. Weikert, Joanne Weikert, Rowland Miller, Eleanor Miller, Barton L. Bennett, George M. Travis, Billie M. Travis, Mel E. Pourchot, Robert L. Pourchot, Gerard J. Venable, Mary Ellen Venable, Kyle L. Swaggerty, John M. Walsh, Angel S. Roubin, Hotel Partners #39, Ltd., Robert L. Pourchot, William R. Aufricht, David F. Cope, Charles J. Freeland, III, Richard V. Taurel, Ralph C. Weiser, Samuel Kaplan, O.J. Harding, John Hill, Jr., Francis T. Kostohryz, Frank B. Mayers, Hotel Partners #16, Ltd., Jack Pines, Arch L. Heady, Pattie Heady, W.C. Allen, III, Kalidas S. Sahetya, Gul K. Sahetya, Michael Steelman, Barbara Steelman, Hotel Partners #34, Richard P. Menaul, Mary C. Menaul, Hotel Partners #55, Ltd., Hotel Partners #101, Hotel Partners #102, Hotel Partners #71, Ltd., Dorothy B. Fickes, David D. Morrow, Doyle M. Morrow, Hotel Partners #36, Ltd., Hotel Partners #18, Ltd., Hotel Partners #81, Ltd., Hotel Partners # 25, Ltd., Hotel Partners #3, Ltd., Hotel Partners #31, Ltd., Bruce A. Hartwig, Virginia M. Hartwig, Harold L. Hausman, Hotel Partners #45, Ltd., Hotel Partners #47, Ltd., James W. Utt, Fred VanBenschoten, Dorothy C. VanBenschoten, Richard P. Menaul, Mary C. Menaul, Hotel Partners #51, Ltd., Hotel Partners #35, Ltd., William B. Kimball, Jr., Richard J. Conroy, Marian T. Conroy, Hotel Partners #32, Ltd., Alan D. Sims, James E. Wiley, Jess V. Hansen, Joan M. Hansen, Registry Hotel Corp., Frank A. Donnelly (Co-Trustee), Mary F. Donnelly (Co-Trustee), Hotel Partners #19, Ltd., William

J. Chorkley, Alice M. Chorkley, Hotel Partners #30, Ltd., James E. Gundry, Hotel Partners #17, Ltd., K.J. Shah, Hotel Partners #86, Ltd., Sergio Larach, Emil Garnil, Judith Garnil, Harold P. Cousins, Virginia H. Cousins, Raymond Benner, Cecilia Benner, Gary W. Sonnier, Catherine R. Sonnier, Hotel Partners #83, Ltd., John J. Maddux, Sammie S. LaFosse, Seaborn W. Hillis, Hotel Partners #76, Ltd., Hotel Partners #77, Ltd., Hotel Partners #96, Ltd., Hotel Partners #95, Ltd., Frederic J. Oppenheimer, Dorothea C. Oppenheimer, Bernard Lahasky, Arch L. Heady, Pattie Heady, Robert E. Brehrandt, Jack D. Minner, Robert D. Shapiro, James R. Willett, Norma L. Willett, Hotel Partners #15, Ltd., Hotel Partners #66, Ltd., John H. Campbell, Hotel Partners #20, Ltd., Phillip B. Cohen, Hotel Partners #4, Ltd., Frank L. Snead, Nancy F. Snead, Gary Sonnier, Trustee, W. S. Prevost, Carl K. Beaudry, William Massad, Nancy Anne Massad, Aubrey L. Dunn, Betty Jo Dunn, Ira Polk Hildebrand, Henrietta Hildebrand, Harold J. Bouillion, Michael D. Williams, Ronald P. Masnicki, Virginia A. Masnicki, Herbert H. McAdams, II, Hotel Partners #85, Ltd., Harold Forkas, William Geoghegan, M & W Associates, Ltd., Hotel Partners #6, Ltd., Hotel Partners #6, Ltd., Hotel Partners #7, Ltd., Francisco I. Pena, Maria Lusia Pena, George H. Pettway, Hotel Partners #33, Ltd., Susy Neel Mayo Trustee, Hotel Partners #10, Ltd., Hotel Partners #103, Ltd., JAFS Corp., Betty Jo Ashe, Hotel Partners #23, Ltd., Doanld J. Eurice, Marian M. Eurice, Robert S. Wood, Hotel Partners #24, Ltd., Ralph Chustz, Tom D. Hedrick, Hotel Partners #40, Ltd., Jasubal K. Desal, Sulochana Desal, Harry B. Fleming, Henry Taurel, Trustee, Evelyn B. Donahower, Richard Forman, Hotel Partners #8, Ltd., Joseph M. Catalano, Freda Catalano, B.C. Meeks, Sara J. Meeks, Dale J. Pennington, Kenneth J. Miller, Hotel Partners #65, Ltd., Claude I. Gaudette, James L. O'Connor, Robert A. Horvath, Shirley L. Horvath, Henry V. Denolf, Joanne L. Denolf, Graham C. Lount, Eileen Mickelson, Verona A. Engebritson, Arni C. Thorsteinson, Dorothy Skinner, Hotel Partners #50, Ltd., Khaled M. Diab,Valera A. Barker, Hotel Partners #26, Ltd., Hotel Partners #46, Ltd., Hotel Partners #67, Ltd., Hotel Partners #38, Ltd., Hotel Partners #28, Ltd., Hotel Partners #22, Ltd., Robert A. Jackson, Lawrence M. Richard, Hotel Partners #100, Ltd., Hotel Partners #99, Ltd., Hotel Partners #49, Ltd., Joseph Gibson, Pauline Gibson, Hotel Partners #84, Ltd., Douglas R. Conner, Hotel Partners #44, Ltd., James L. O'Connor, Albert R. Porto,

Darrell L. Henderson, Hotel Partners #69, Ltd., Nick R. Bryan, Hotel Partners #89, Ltd., Hotel Partners #90, Ltd., Hotel Partners #78, Ltd., Lawrence M. Richard, Hotel Partners #21, Ltd., John P. Bohn, Hotel Partners #54, Ltd., Randall Faust, Theresa L. Faust, A.G. Graham, Hotel Partner #68, Ltd., Hotel Partners #60, Ltd., William W. Whittle, Hotel Partners #27, Ltd., Hotel Partners #92, Ltd., Hotel Partners #93, Ltd., John Egner, Hotel Partners #74, Ltd., Hotel Partners #72, Ltd., Hotel Partners #75, Ltd., Mohamed K. Nour, Falka Nour, Theodore B. Walton, Nancy C. Walton, Hotel Partners #94, Ltd., Hotel Partners #121, Ltd., Winston Taylor, Garrett G, Carlson, Roland H. Powell, Sandra C. Powell, CCT and Co., a Partnership, Sheila T. Donohur, Curt Witt, John C. Duncan, Hotel Partners #87, Ltd., Ann. M. Mechael, John B. Henderson, Rosemary Henderson, Elmer E. Creech, Hotel Partners #11, Ltd., Hotel Partners #12, Ltd., Stretton Wellington, Eileen Mickelson, James G. Adams, Beverly H. Blount, Freddie R. Cessac, Theta O. Cessac, Hotel Partners #41, Ltd., Hotel Partners #22, Ltd., Alvin L. Prichard, Marilyn Prichard, Ernest E. Cherrie, Jr., Hotel Partners #91, Ltd., Stretton K. Wellington, Hotel Partners #88, Ltd., Hal L. Kime, Phillip W. Dunn, Denis P. Christenson, Judith A. Christenson, Hotel Partners #70, Ltd., Christopher G. Allen, Hotel Partners #56, Ltd., Hotel Partners #82, Ltd., Hotel Partners #57, Ltd., Hotel Partners #62, Ltd, the *Becherer Plaintiffs*, and Petitioners.

The Defendants/Respondents are: Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Can-American Corporation, Can-American Realty Corporation, Shelter Seagate Corporation, Garrett G. Carlson, Graham C. Lount, Arni Thorsteinson, Frank Lavin, Martin Cicco, Laventhol & Horwath, Dominion Financial & Investment Corp., n/k/a Trustbank Mortgage Center, Inc., M.A. Mortenson Company, Winsor/Faricy Architects, Inc., and Midwest Title Guarantee Company of Florida.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ix

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

CONSTITUTIONAL PROVISIONS/
STATUTES INVOLVED . . . . . 1

STATEMENT OF THE CASE . . . . . 1

A. Introduction . . . . . 1

B. Court Proceedings . . . . . 4

1. Opposition Class Certification . . . . . 4

2. The Limited SSG Class Certification . . . . . 4

3. The Conditional
Settlement Class Certification . . . . . 5

4. The March 24, 1992 Gag Order . . . . . 7

5. Petitioners' Efforts to Arbitrate . . . . . 9

6. The District Court's Rulings . . . . . 9

7. The District's Court's Post-Ruling Actions . . 9

8. The District Court's Res Judicata Findings . . 11

9. The Sixth Circuit Court's Approval . . . . . 12

10. Post-Remand Proceedings in the
District Court . . . . . 13

11. Effect of Court Proceedings . . . . . 13

REASONS FOR GRANTING THE WRIT . . . . . 13

I. REVIEW IS NECESSARY BECAUSE THE SIXTH CIRCUIT VIOLATED FUNDAMENTAL CONCEPTS OF DUE PROCESS BY ALLOWING THE DISTRICT COURT TO EXERCISE PERSONAL JURISDICTION OVER PUTATIVE CLASS MEMBERS, AND FORECLOSE THEM FROM FUTURE LITIGATION AND ARBITRATION UNDER A THEORY OF "VIRTUAL REPRESENTATION" WHEN THE CLASS WAS NEVER CERTIFIED UNDER FED.R. CIV.P. 23 AND THE PUTATIVE CLASS MEMBERS LACKED THE REQUISITE MINIMUM JURISDICTIONAL CONTACTS WITH THE FORUM . . . . . 14

1. Personal Jurisdiction Requires Either Class Certification, Sufficient Minimum Contacts, and Consent . . . . . 14

2. Personal Jurisdiction Could Not Be Acquired Over Putative Class Members Who Were Never Notified, After The Conditional Settlement Class Failed . . . . . 16

3. Virtual Representation Is Not a Substitute For The Requirements of Due Process . . . . . 18

4. The District Court's Notice Misled Petitioners . . . . . 20

5. The Anti-Injunction Act Cannot Be Used Because The District Court Lacked Personal Jurisdiction . . . . . 21

6. The Obstructive Injunction Is Contrary To The Federal Arbitration Act And The Precedent Of This Court . . . . . 23

II. REVIEW IS NECESSARY BECAUSE THE DISTRICT COURT'S GAG ORDER, AND THE CIRCUIT COURT'S FAILURE TO PROVIDE RELIEF, VIOLATED PETITIONERS' DUE PROCESS AND FIRST AMENDMENT GUARANTEES . . . . . 25

CONCLUSION . . . . . 31

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Allied-Bruce Terminix Companies, Inc. v. Dobson*,
513 U.S. ___, 115 S.Ct. 834,
130 L.Ed.2d 753 (1995) . . . . . 24

*Anderson v. John Morrell & Co.*,
830 F.2d 872 (8th Cir. 1987) . . . . . 16

*Baxter v. Palminigiano*,
425 U.S. 308, 96 S. Ct. 1551,
47 L. Ed. 2d 810 (1976) . . . . . 15

*Bernard v. Gulf Oil Co.*,
619 F.2d 459 (5th Cir. 1980),
*aff'd on other grds*,
452 U.S. 89 (1981) . . . . . 25-28, 30

*Carlough v. Amchem Products, Inc.*,
10 F.3d 189 (3d Cir. 1993) . . . . . 15, 17, 22, 23

*CBS, Inc. v. Young*,
522 F.2d 234 (6th Cir. 1975) . . . . . 27, 28

*Doe v. Bolton*,
126 F.R.D. 85 (N.D. Ga. 1989) . . . . . 15

*Eisen v. Carlisle & Jacquelin*,
417 U.S. 156, 94 S. Ct. 2140,
40 L. Ed. 2d 732 (1974) . . . . . 17, 20

*General Telephone Co. v. Falcon*,
457 U.S. 147, 102 S. Ct. 2364,
72 L. Ed. 2d 740 (1982) . . . . . 16

*Gert v. Elgin Nat'l Industries, Inc.*,
773 F.2d 154 (7th Cir. 1985) . . . . . 16

*Gonzales v. Cassidy*,
474 F.2d 67 (5th. Cir. 1973) . . . . . 18

*Hansberry v. Lee*,
311 U.S. 32, 61 S. Ct. 115, 85 L. Ed 22 (1940) . . . . 14

*Herbert v. Monsanto Co.*,
576 F.2d 77 (5th Cir. 1978) . . . . . 17

*In Gulf Oil Co. v. Bernard*,
452 U.S. 89, 101 S. Ct. 2193,
68 L. Ed. 2d 693 (1981) . . . . . 27, 29, 30

*In Re A.H. Robins Co., Inc.*,
880 F.2d 709 (4th Cir.) *cert denied*,
493 U.S. 959 (1989) . . . . . 15

*In re Glenn W. Turner Enterprises Litigation*,
521 F.2d 775 (3d Cir. 1975) . . . . . 17

*In re Real Estate*,
869 F.2d 760, 768 (3rd Cir.), *cert denied*
493 U.S. 821 (1989) . . . . . 21, 23

*Ins. Corp. of Ireland Ltd. v.*
*Compagnie des Bauxites de Guinee*,
456 U.S.694 102 S.Ct. 2099,
72 L. Ed. 2d 492 (1982) . . . . . 16

*Jones v. Diamond*,
594 F.2d 997 (5th. Cir. 1979) . . . . . 18

*Mason v. Eldred*,
73 U.S. 231, 8 L. Ed. 738 (1868) . . . . . 20

*Mastrobuono v. Shearson Lehman Hutton*,
___ U.S. ___, 115 S. Ct. 1212,
131 L. Ed. 2d 76 (1995) . . . . . 24

*McArthur v. Scott*,
113 U.S. 340, 5 S. Ct. 652 L.Ed 1015 (1885) . . . . . 19

*Mullane v. Central Hanover Bank & Trust Co.*,
339 U.S. 306, 70 S. Ct. 652,
94 L. Ed. 865 (1949) . . . . . 17, 20, 21

*New York Times Co. v. U.S.*,
403 U.S. 713, 91 S.Ct. 2140,
2149 L. Ed. 2d 822 (1971) . . . . . 28

*Phillips Petroleum Co v. Shutts*,
472 U.S. 797, 105 S.Ct. 2965,
86 L.Ed. 2d 628 (1985) . . . . . 14, 17, 18

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,
388 U.S. 395, 87 S. Ct. 1801,
18 L. Ed. 2d 1270 (1967) . . . . . 24

*Pugh v. Frierson*,
221 F.513 (6th Cir. 1915) . . . . . 19, 20

*Roberts v. American Airlines*,
526 F.2d 757 (7th Cir. 1975) . . . . . 15

*Shelton v. Pargo*,
582 F.2d 1298, 1304 (4th Cir. 1978) . . . . . 15

*Southland Corp. v. Keating*,
465 U.S. 1, 104 S. Ct. 852,
79 L. Ed. 2d 1 (1984) . . . . . 24

*Sullivan v. Chase Investment Services of Boston, Inc.*,
79 F.R.D. 246 (N.D. Ca. 1978) . . . . . 15

*Vendo Co. v. Lektro-Vend Corp.*,
433 U.S. 623, 97 S.Ct. 2881,
53 L.Ed.2d 1009 (1977) . . . . . 22

*Volt Information Sciences*
*v. Board of Trustees of Leland Standford Univ.*,
489 U.S. 468, 109 S. Ct. 1248,
103 L. Ed. 2d 488 (1989) . . . . . 24

*Webster v. State Mut. Life Assur. Co.*,
50 F.Supp 11 (S.D. Cal. 1943) . . . . . 19

*Zenith Radio Corp. v. Hazeltine Research, Inc.*,
395 U.S. 100, 89 S.Ct. 1562,
23 L.Ed. 2d 129 (1969) . . . . . 14

**Statutes**

15 U.S.C. § 77 . . . . . 2

15 U.S.C. § 1719 . . . . . 2

18 U.S.C.§ 1964 . . . . . 2

28 U.S.C. § 1331 . . . . . 2

28 U.S.C. § 2283 . . . . . 21, 22

**Court Rules**

FED.R. CIV.P. 23(b)(3) . . . . . 14

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 43 F.3d 1054. The decisions of the United States District Court for the Eastern District of Michigan are reported at 809 F.Supp 1259 and 799 F.Supp 755.

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 10, 1995. On January 24, 1995, the *Becherer* Plaintiffs timely petitioned the Sixth Circuit for rehearing or for rehearing en banc. On April 11, 1995, the Sixth Circuit denied the *Becherer* Plaintiffs' petition. On April 19, 1995, Petitioners timely filed a Petition to Stay Issuance of Mandate. On April 26, 1995, the Sixth Circuit granted the stay. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS/STATUTES INVOLVED

This case involves U.S. CONST. amend. I., U.S. CONST. amend V; 28 U.S.C. §283; 9 U.S.C. §2; and FED.R. CIV.P. 23. These provisions are reprinted in Appendix I, *infra*.

## STATEMENT OF THE CASE

### A. Introduction

This petition presents the general issue whether members of a conditional class (which was never unconditionally certified) who lacked the requisite minimum contacts with the judicial forum may nevertheless be foreclosed from further, individual litigation under principles of *"virtual representation"*. Petitioners, who either preserved their rights to object to the conditional class settlement or opted-out of the conditional settlement class which subsequently failed, submit that the exercise of personal jurisdiction over them by the Sixth Circuit Court of Appeals and the Eastern District of Michigan violates fundamental rights of due process of law.

On August 21, 1989, six individuals, the *Becherer* Plaintiffs, commenced suit in the United States District Court for the Eastern District of Michigan, as a proposed FED.R. CIV.P. 23(b)(3) class action. The *Becherer* Plaintiffs, and the class members they sought to represent, were investors (purchasers of units) in The Registry Hotel ("Hotel"), a resort hotel condominium project located in Naples, Florida. The Complaint asserted a variety of claims, including securities fraud violations, common law fraud,

breach of contract, and federal and state RICO violations.[1]

There were 298 investors in the 474 unit Hotel. As the suit unfolded, the *Becherer* Plaintiffs moved for class certification on all of their claims pursuant to FED.R. CIV.P. 23(b)(3). The district court eventually certified a class under Rule 23(b)(3) for the limited purpose of trying contract claims against one, clearly defined group of defendants:[2] the SSG defendants ("SSG class"). In February 1992, the district court *conditionally* certified a second class, consisting of all unit owners, solely to consider a proposed settlement of all claims against all defendants. *The proposed settlement failed*. The district court never certified any additional classes thereafter, for any purpose.

The district court disposed of the contract claims of the SSG class on the merits by order entered in August, 1992. At the same time, the district court disposed of the named *Becherer* Plaintiffs' securities and fraud claims ("individual claims") on Summary Judgment in favor of defendant Merrill Lynch.

The Petitioners are a group of investors in the hotel who were represented by independent legal counsel (as opposed to class counsel) who either opted-out from the failed settlement class or reserved their right to object to the fairness of the settlement. After the settlement failed, the Petitioners sought to pursue their securities and fraud claims against Merrill Lynch and the Naples, Florida Merrill Lynch Branch Office Manager (who was not named as a defendant in the Michigan action) in Florida state court

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[1] The district court had subject matter jurisdiction pursuant to (i) Section 22(a) of the Securities Act of 1993, 15 U.S.C. § 77v; (ii) Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 77aa; (iii) Section 1964 of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C.§ 1964; (iv) Section 1719 of the Land Sales Act, 15 U.S.C. §1719; Section 1331 of the United States Judicial Code 28 U.S.C. § 1331; and (vi) the doctrines of ancillary and pendent jurisdiction.

[2] This group of defendants, generally involved with development, included Can-American Corporation, Can-American Realty Corporation, Shelter Seagate Corporation, Garrett G. Carlson, Graham C. Lount, and Arni Thorsteinson ("SSG Defendants"). The *Becherer* complaint identified other defendants as well, including the exclusive selling agents for the sale of interests in the hotel: Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and its agents Frank Lavin and Mark Cicco, ("Merrill Lynch" defendants).

and arbitration proceedings ("Florida proceedings").

After Petitioners filed their Florida action, Merrill Lynch moved in the district court in Michigan seeking to enjoin Petitioners' Florida proceedings. Merrill Lynch asserted that Petitioners, as putative class members in the Michigan action, were bound by the district court's summary dismissal of the *Becherer* Plaintiffs' claims against Merrill Lynch.

Despite the fact that no class had ever been certified with respect to the *Becherer* Plaintiffs' claims against Merrill Lynch, and despite the fact that the claims and the parties in the Michigan action and the Florida proceedings were not identical, the district court ruled that the Petitioners' Florida claims were *res judicata* and enjoined Petitioners' Florida court and arbitration proceedings under the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283 (the "obstructive injunction"). The district court held that the Petitioners were actual parties before the court and, as such, made clear that it intended the Petitioners to be bound by all judgments entered in the Michigan action. 809 F.Supp 1259 (ED MI, 1992). Petitioners, the *Becherer* Plaintiffs, and class counsel all agreed that the Petitioners were not parties to any of the claims and proceedings[3] the individual *Becherer* plaintiffs asserted against Merrill Lynch.

On appeal to the Sixth Circuit, the Petitioners challenged the district court's assertion of personal jurisdiction over Petitioners; its issuance of the obstructive injunction that interfered with Petitioners' ability to proceed in Florida; a March 24, 1992 Order that restricted communication between Petitioners and their counsel, Thomas Grady (the "Gag Order"); and the district court's use of the "relitigation exception" to the Anti-Injunction Act. While the Sixth Circuit vacated the obstructive injunction, it held that the district court had jurisdiction and remanded the case for a determination of whether *res judicata*, based on the theory of "virtual representation," precludes further litigation by Petitioners. Thus, the Sixth Circuit has ruled that despite the fact that Petitioners either opted-out or preserved their right to object to a conditional class settlement where the class was never certified,

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[3] Of course, Petitioners were joined in the limited SSG class, but only for the limited purpose of pursuing their contract claims against the SSG Defendants.

they have somehow become subject to the personal jurisdiction of the district court and may be foreclosed from further litigation and arbitration under the theory of "virtual representation."

**B. Court Proceedings**

**1. Opposition Class Certification**

The *Becherer* Plaintiffs brought the underlying suit as a proposed class action and moved for class certification on all of their claims on November 6, 1989, pursuant to FED.R. CIV.P. 23(b)(3) to certify a class consisting of all unit owners in the Hotel. On December 1, 1989, prior to challenging certification of the class, Merrill Lynch moved to dismiss the *Becherer* Plaintiffs' complaint. Significantly, Merrill Lynch also later filed a motion in opposition to class certification but *asked in the alternative for a stay on the question of class certification pending the district court's ruling on Merrill Lynch's motion to dismiss.*

Merrill Lynch offered the district court a host of reasons not to certify the class as requested by the *Becherer* Plaintiffs. Among other things, Merrill Lynch argued that there had been an insufficient demonstration of commonality among the various class members to satisfy the requirements of Rule 23(a)(2) and Rule 23(b)(3). Merrill Lynch also argued that allegations in the complaint of oral misrepresentations rendered the matter unsuitable for class action treatment. Moreover, Merrill Lynch attacked the *Becherer* Plaintiffs' motion for class certification on the grounds that the claims of the named plaintiffs were not typical of the claims of the class and that there had been no showing that the would-be class representatives had the ability to finance the proposed litigation.

At a pretrial conference held on April 23, 1990 the district court adjourned the motion hearing for class certification to a date to be determined at a later time. But, no class was ever certified with respect to any claims the *Becherer* Plaintiffs made against Merrill Lynch, nor did Merrill Lynch ever withdraw its opposition to class certification.

**2. The Limited SSG Class Certification**

On February 15, 1991, Merrill Lynch renewed its motion to dismiss and for summary judgment on the named Plaintiffs' claims. Merrill Lynch moved prior to any determination of the class certification question. The district court limited the *Becherer*

Plaintiffs' action at a status conference held on March 12, 1991, certifying a class *solely* for the express, limited purpose of holding an expedited trial of the unit owners' breach of contract claims against the SSG Defendants. March 12, 1991, Status Conference Transcript ("March 12, 1991 Tr.") at 10.

Not only did Merrill Lynch express its opposition to class certification of claims other than contract claims at the March 12, 1991 Status Conference, *but the district court clearly recognized, at least at that time, that it would be necessary to certify a class in order to bind putative class members to any judgment against any of the defendants.*

On March 15, 1991, the district court entered an Order certifying a Rule 23(b)(3) plaintiff class solely for purposes of an expedited trial of breach of contract claims against the SSG Defendants. In accordance with the March 15 Order, a Notice of Pendency of Class Action was sent to all unit owners. This Notice clearly defined the class and purposes for certification and emphasized in capital letters the very limited nature of the certification:

> THE COURT'S ORDER GRANTING CLASS ACTION STATUS WAS LIMITED SOLELY TO BREACH OF CONTRACT AGAINST SSG AND THEIR AFFILIATES AS DISCUSSED MORE FULLY HEREIN. (Capitalization and emphasis in original).

This Notice did not mention Merrill Lynch, nor did it discuss claims against Merrill Lynch. In fact, nothing in the Notice gave any putative class member any reason to believe that they had to opt-out in order to preserve their individual claims against other defendants, such as Merrill Lynch. To the contrary, the Notice made clear that no claims against Merrill Lynch or defendants other than the SSG Defendants would be reached as a result of this limited class certification. Moreover, the Notice correctly advised putative class members that if they elected to opt-out of the class, they would *not* be barred from asserting any claims they might wish to make against the SSG Defendants.

### 3. The Conditional Settlement Class Certification

After the expedited trial on the breach of contract claims against the SSG Defendants in May, 1991, but prior to final

argument, settlement discussions among the parties, including defendants not involved in the breach of contract trial, began in earnest. After an agreement was reached with respect to a proposed settlement, the district court entered an order on February 14, 1992 conditionally certifying a class for settlement purposes. In addition, the district court approved a Notice of Proposed Settlement and Conditional Class Action Certification ("Conditional Class Notice"). At this point, neither Merrill Lynch, nor the district court, suggested that this costly and elaborate class notice and certification procedure could be avoided because putative settlement class members, including the Petitioners, were already parties or in privity with parties to all claims for which settlement was proposed.

The Conditional Class Notice approved by the district court and sent to putative class members including the Petitioners is noteworthy for a number of reasons. First, the Notice made it clear that the class was only *conditionally* certified for consideration of the proposed settlement. If the settlement was not approved, the conditional certification was void. Second, this Notice plainly distinguished the purpose of the conditional class from that of the class certification for trial of the contract claims against the SSG Defendants:

> This is a conditional Settlement Class, unlike the class certified in March, 1991 for contract claims against the SSG Defendants, the Settlement Class covers <u>all</u> claims against <u>all</u> Defendants, except M.A. Mortenson Company. [Conditional Class Notice at 6 (emphasis in original).]

The Notice also provided an opportunity for putative members of the class to opt-out of the settlement class or, alternatively, to object to the fairness of the settlement. *Id.* at 20-22. Moreover, the Notice at 20 clearly apprised putative class members of their right to retain an attorney and file suit at their own expense if they elected to be excluded from the settlement:

> In order to continue pursuing your claims (other than the specific breach of contract claims which were the subject of the court proceedings and trial between May 7, 1991 and May 17, 1991 against the SSG Defendants), you will have to retain your own attorney and file suit at your own expense.

Finally, the Notice plainly indicated that persons who excluded themselves from the settlement would only remain before the court as members of the class certified for trial of the breach of contract claims against the SSG Defendants and that no decision would be made on whether to certify a class on other claims and as to other defendants until the trial was complete and pending motions were decided:

> If you exclude yourself from the Settlement and are a member of the class certified in March 1991, your case will continue before this Court. The Court will then complete the trial on the contract claims, decide the pending motions and, if the case continues, decide whether a class should be certified on other claims and as to other defendants. [*Id.* at 7.]

**4. The March 24, 1992 Gag Order**

After the February 14, 1992 Notice sent out to putative class members, counsel for the Petitioners, Thomas Grady and Grady & Associates, L.P.A., received a number of inquiries about the settlement from putative class members who were already clients of Grady and his firm or who wanted independent advice from an attorney not involved in the Michigan proceedings. After conferring with his clients and reviewing the proposed settlement, Grady concluded that the settlement did not provide the remedy most of his clients were seeking, *i.e.*, rescission of their investments in the hotel (an "exit strategy"). He also determined that additional information was needed from class counsel with respect to the terms and ramifications of the settlement and the decision by class counsel that the settlement was one that should be accepted by putative class members.

During the course of his efforts to obtain this information and properly advise his clients in regard to the proposed settlement, the relationship between Grady and class counsel, which had previously been distant but harmonious, foundered. Grady received reports from various clients that class counsel was attempting to pressure them into accepting the settlement. Grady also learned many of his clients intended to opt-out of the conditionally certified class or at least reserve their objections to the fairness of the settlement. Grady then wrote to class counsel on March 9, 1992 and advised him of the number of clients represented by Grady who wished to be excluded from the class

and also requested that class counsel's communications with these clients be directed to or through Grady's office as a result of his representation of those parties (as allowed or even required by the certification notice of February 14, 1992). Grady repeated this request on March 10, 1992. These letters ostensibly prompted class counsel to request the district court to hold a conference regarding the matter.

On March 12, 1992, the district court issued an Order to Show Cause as to Duties and Responsibilities of Attorneys for Plaintiff Class ("March 12, 1992 Show Cause Order"). In particular, this Order stated that jurisdiction existed over Grady "because he purports to represent certain individuals involved in this litigation." March 12, 1992 Show Cause Order at 2. The Order further stated, "[a]s such the advice he gives to certain individuals who are members of the Plaintiff Class will impact the outcome of this action and the proposed settlement. *Id.* at 2-3.

Grady hired counsel to appear and represent him at the hearing on the Show Cause Order which took place on March 19, 1992. At that hearing, counsel for Grady entered an appearance to contest the district court's attempted exercise of jurisdiction over Grady and his firm and also provided the district court with a response to the Show Cause Order prepared by Grady, *i.e.*, Grady's March 19, 1992 letter to the district court. Following the Show Cause hearing, the district court issued an order on March 24, 1992 (the "Gag Order") reiterating its determination that it had personal jurisdiction over Grady, who had never previously visited the state of Michigan, as a result of his representation of putative class members in their individual capacities.[4] (Notably, neither the district court nor any of the counsel at the show cause hearing were able to offer any authority for the district court's exercise of jurisdiction over Grady and his law firm, neither of which had appeared in the action.) The Gag Order further provided that Grady

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[4] The district court determined that class counsel could continue to directly communicate with Petitioners, despite Grady's representation of Petitioners and request that any further communications be directed to Grady. Additionally, the district court extended the opt-out deadline from March 9, 1992 (which had already expired at the time of the hearing) to April 14, 1992 to allow class counsel an opportunity to re-solicit putative class members in an effort to change their previously expressed decision to opt-out.

> must impart only accurate, objective, balanced information regarding the settlement. Any statement made by an attorney suggesting that litigation can be commenced in state court by any Class member who opts out of the settlement is inappropriate inasmuch as this court has exclusive jurisdiction over this matter. [March 24, 1992 Order at 4.]

Significantly, this directive contradicted the February 14, 1992 Notice provided to putative class members which stated that if they chose to exclude themselves from the settlement they could retain their own counsel and file their own suit.

**5. Petitioners' Efforts to Arbitrate**

The proposed settlement failed in April of 1992 when Merrill Lynch elected to withdraw its prior conditional approval of the settlement based upon the number of putative class members who had opted-out. No other class was certified by the district court for purposes of adjudicating any of the other claims against the other defendants, including Merrill Lynch. On July 28, 1992, Petitioners filed a complaint in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida against Merrill Lynch and its Naples, Florida Branch Office Manager, Thomas Ashman. That case is titled *Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Case No. 92-2776-CA-01.

In the complaint and by motion, Petitioners requested in the Florida state court that the proceedings be stayed pending arbitration before the NASD. The Petitioners acknowledged in the complaint filed in Florida that arbitration was the proper place to resolve claims of the Petitioners against Merrill Lynch.

**6. The District Court's Rulings**

On August 7, 1992, the district court issued its opinion and orders in which it made various findings in connection with the bench trial of the SSG class' breach of contract claims. On the same date, the district court also granted Merrill Lynch's motion for summary judgment on the claims, dismissing the *Becherer* Plaintiffs' remaining, individual claims.

**7. The District's Court's Post-Ruling Actions**

Following the entry of final judgment in its favor with regard to the *Becherer* Plaintiffs' remaining, individual claims, Merrill

Lynch moved to enjoin Petitioners from proceeding with their state court claims in Florida and their NASD claims in arbitration. In support of its motion for an injunction, Merrill Lynch argued that the district court had inherent power under the All Writs Act, 28 U.S.C. § 1651(a), and the "relitigation exception" to the Anti Injunction Act, 28 U.S.C. § 2283, to determine the *res judicata* and collateral estoppel effect of its judgment in favor of Merrill Lynch and to effectuate that judgment by enjoining the Petitioners from pursuing their claims against Merrill Lynch in state court. At the initial hearing held on Merrill Lynch's motion to enjoin the state court and arbitration proceedings, Merrill Lynch did not contest the fact that no class had ever been certified in connection with securities law and fraud claims against Merrill Lynch. Rather, Merrill Lynch argued that notwithstanding that there had been no class certification, the district court had personal jurisdiction over the Florida Intervenors as a result of their decision not to opt-out of the breach of contract trial against the SSG Defendants and that Petitioners were in any event bound by the judgment in favor of Merrill Lynch because they were in "privity" with the *Becherer* Plaintiffs. Ironically, Merrill Lynch, who continually asserted that class certification was inapplicable due to the lack of commonality between the putative class members, now asserted that all members were in privity.

The district court made clear in that hearing that it believed it had jurisdiction over all of the putative class members including Petitioners, regardless of whether a class had been certified as to all of the issues in the litigation:

> The Court: I don't have any difficulty with that. I have jurisdiction over all of **these people that started suit here**, and my jurisdiction is not dependent on whether or not I certified a class later as to some of them or as to some of the -- as to the issues that affect -- as to some issues that affected all of them, the contract issues. These people, in my judgment -- all of **these investors who started this action** are still before me.[5] [September 14, 1992 Tr. at 42 (emphasis

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[5] The district court used this reasoning to assert personal jurisdiction over all of the putative class members, despite the fact that the only investors to start the action in the district court were the *Becherer* plaintiffs.

added).]

The district court continued to take this position throughout the September 14 hearing, even after counsel for the *Becherer* Plaintiffs (who was also counsel for the class certified for purposes of breach of contract claims against the SSG Defendants) adamantly maintained that he and his colleagues did not represent any persons other than the named plaintiffs, *i.e.*, the *Becherer* Plaintiffs, with respect to any claims other than the breach of contract claim against the other SSG Defendants.

**8. The District Court's Res Judicata Findings**

Following a hearing on October 15, 1992,[6] the district court issued an opinion and an injunctive order. 809 F. Supp. 1259 (E.D. MI. 1992). Several of the premises and conclusions of the district court should be noted.

First, the district court determined that *all* investors in the hotel including Petitioners were parties for all purposes in the case, and represented through the named plaintiffs and their counsel for all purposes in the case. The only basis offered by the district court for this conclusion was that the original complaint filed by the *Becherer* Plaintiffs sought to have all their claims heard as a class action and that Petitioners were members of the SSG class, certified for the explicit and limited purpose of trying the breach

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[6] On October 15, 1992, the district court held a hearing on the Petitioners' motion to intervene for purposes of preserving their right to contest the district court's exercise of personal jurisdiction over them and their counsel and to bind them to judgments issued in favor of defendants, such as Merrill Lynch. Petitioners also emphasized that there was no legal basis for the March 24, 1992 order purporting to restrict communications between Petitioners and their counsel.

After vigorously opposing class certification, Merrill Lynch effectively asked the district court to disregard FED. R. CIV.P. 23 and treat the Petitioners as if they were bound by a class judgment. As counsel for the *Becherer* Plaintiffs and counsel for Petitioners argued, the district court was simply without power to proceed in such a fashion. In fact, the district court had previously recognized the inherent flaws in a similar position advanced by Merrill Lynch at the March 12, 1991 Status Conference and had dismissed the position as "shifty." *Id.* at 27. Petitioners were not permitted to intervene, but were treated as parties (as were all other unit owners); this issue was also appealed to the Sixth Circuit Court of Appeals.

of contract claims against the SSG Defendants.

Second, the district court reasoned that all parties in the hearings on motions for summary judgment or dismissal of the *Becherer* Plaintiffs' remaining, individual claims proceeded on the basis that "my decisions would bind all investors." 809 F. Supp. at 1262. The district court offered no basis for that reasoning, but ignored the plain import of its own class certification notices and the fact that Merrill Lynch had asked that no decision be made on class certification until its dispositive motions against the *Becherer* Plaintiffs were decided.

Third, the district court held that all investors in the hotel were in privity with the *Becherer* Plaintiffs. *Id.* The district court seemed to reach this conclusion based on an awkward amalgam of the fact that the *Becherer* Plaintiffs had sought class certification on the fraud and securities claims and that Petitioners were class members for purposes of the breach of contract claim trial against the SSG Defendants. Alternatively, the district court stated that the interests of the *Becherer* Plaintiffs were somehow identical to the interests of Petitioners even though Petitioners repeatedly argued that they agreed with Merrill Lynch that class certification would be inappropriate on the fraud and securities claims because of the individual nature of the facts underpinning those claims. Further, the district court completely ignored the fact that Petitioners sought to arbitrate their claims pursuant to their customer agreements with Merrill Lynch and the Federal Arbitration Act. This fact alone precluded adequate representation by the *Becherer* Plaintiffs who were interested only in a lawsuit in court.

Based on its findings, the district court permanently enjoined Petitioners from maintaining or proceeding in their Florida court and arbitration actions. 809 F.Supp at 1276-77.

**9. The Sixth Circuit Court's Approval**

While the Sixth Circuit vacated the obstructive injunction issued by the district court, finding error with the district court's broad definition of "adequate representation" (or "virtual representation" as labeled by the circuit court), it authorized the district court's continued exercise of personal jurisdiction over Petitioners, by remanding the case to the district court for a determination of whether privity existed between Petitioners and the *Becherer* Plaintiffs under the correct definition of "virtual

representation." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054 (6th Cir. 1995).

**10. Post-Remand Proceedings in the District Court**

The Sixth Circuit entered its opinion on January 10, 1995. Subsequent to the court's disposition, the *Becherer* Plaintiffs filed a petition for rehearing and a petition for rehearing en banc. Prior to the circuit court's disposition on the *Becherer* Plaintiffs' petition for rehearing, the district court initiated on its own motion, a "discovery" period on the issue whether the *Becherer* Plaintiffs and their counsel, Elwood S. Simon, represented Petitioners under the doctrine of "virtual representation." Counsel for Merrill Lynch issued document subpoenas, not only to Mr. Simon, but to other attorneys who provided independent representation to members of the putative class that was never certified. Those subpoenas purportedly require the production from attorneys of large quantities of documents, including many privileged documents.

Subsequently, Petitioners requested a stay from the Sixth Circuit (April 19, 1995), which it granted on April 26, 1995.

**11. Effect of Court Proceedings**

As it stands, Petitioners remain subjected to the claimed personal jurisdiction of the district court despite the absence of class certification, minimum contacts with the forum, and consent. Petitioners' challenge to the constitutionality of the Gag Order fell on deaf ears, as the Gag Order remains in effect, exposing Grady to sanctions for providing advice to his clients.

## REASONS FOR GRANTING THE WRIT

**1. REVIEW IS NECESSARY BECAUSE THE SIXTH CIRCUIT VIOLATED FUNDAMENTAL CONCEPTS OF DUE PROCESS BY ALLOWING THE DISTRICT COURT TO EXERCISE PERSONAL JURISDICTION OVER PUTATIVE CLASS MEMBERS, AND FORECLOSE THEM FROM FUTURE LITIGATION AND ARBITRATION UNDER A THEORY OF "VIRTUAL REPRESENTATION" WHEN THE CLASS WAS NEVER CERTIFIED UNDER FED.R. CIV.P. 23 AND THE PUTATIVE CLASS MEMBERS LACKED THE REQUISITE MINIMUM JURISDICTIONAL CONTACTS WITH THE FORUM**

> "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person . . . ."

*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct. 1562, 23 L.Ed. 2d 129, 140 (1969).

**1. Personal Jurisdiction Requires Either Class Certification, Sufficient Minimum Contacts, and Consent**

The Sixth Circuit sanctioned the district court's departure from the accepted and usual course of judicial proceedings by ignoring this Court's requirement of personal jurisdiction. While certification of a class under FED.R. CIV.P. 23(b)(3) provides a mechanism for obtaining personal jurisdiction over putative class members, *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed 22 (1940), a court does not obtain personal jurisdiction over absent members when the class certification fails. *See Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed. 2d 628 (1985).

The district court only certified a class for the limited purpose of trying contract claims against the SSG defendants. Those claims are not at issue in this petition. The conditional class for settlement purposes, involving all of the claims in the *Becherer* complaint against all of the defendants, failed when Merrill Lynch exercised its right to drop out of the settlement based upon the large number of putative class members who opted-out of the conditional settlement class. Accordingly, the district court did not obtain personal jurisdiction over Petitioners by class certification.

The district court's treatment of the *Becherer* Plaintiffs and Petitioners as a class after the settlement failed was not only clear legal error, but a violation of the Petitioners' rights to due process of law.[7] "Without such certification . . . the action is not properly a class action." *Baxter v. Palminigiano*, 425 U.S. 308, 310 n.1, 96 S. Ct. 1551, 1554 n.1, 47 L. Ed. 2d 810 (1976) (*dicta*). "[I]n

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[7] Not only did the district court treat the *Becherer* Plaintiffs and Petitioners as a class, it continually referred to them collectively as a "plaintiff class." The circuit court recognized, however, that in the absence of a successful certification there can be no "class." "Despite the fact that the District Court speaks of a 'plaintiff class' here, no such class was certified as to this issue." 43 F.3d at 1061, n.6.

an appeal from a decision on the merits made without prior class determination required by Rule 23(c)(1), the reviewing court will treat the case as one brought by the named plaintiff only and not as a class action." *Roberts v. American Airlines*, 526 F.2d 757, 762 (7th Cir. 1975). *Accord*, *Shelton v. Pargo*, 582 F.2d 1298, 1304 (4th Cir. 1978) ("[C]lass actions are not created by mere allegations in a complaint."); *Doe v. Bolton*, 126 F.R.D. 85, 87 (N.D. Ga. 1989) ("'It is the actual certification of the action ... which alone gives birth to "the class as a jurisprudential entity . . .."'") (citations omitted).

Personal jurisdiction over Petitioners was not, and has not been, obtained. The Petitioners did not have the requisite minimum contacts with the Michigan forum, nor did they consent to jurisdiction. *See Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 199 (3d Cir. 1993). Petitioners are absent class members, who are overwhelmingly from states other than Michigan. No one contests that Petitioners lacked the requisite minimum contacts and that Petitioners did not consent to personal jurisdiction. With the exception of their contract claims,[8] Petitioners either opted-out of the conditional settlement class or reserved their right to contest the settlement terms. In any event, the district court did not obtain personal jurisdiction over either group, because the conditional settlement class failed, voiding the conditional certification. Accordingly, the district court failed to acquire its jurisdiction.

"A personal judgment entered without jurisdiction over the person violates due process and is void." *Gert v. Elgin Nat'l Industries, Inc.*, 773 F.2d 154, 159 (7th Cir. 1985) (citing *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). "The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual['s] liberty

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[8] Of course, a court, pursuant to FED.R. CIV.P. 23(c)(4)(A), may certify classes on particular issues. That was done by the district court in this case insofar as breach of contract claims were concerned against the SSG Defendants. When a court does certify a class for such a limited purpose, it is equally settled that "other issues [are] to be adjudicated on an individual basis." 7B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790, at 274 (1986). *See e.g.*, *In Re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.) *cert denied*, 493 U.S. 959 (1989); *Sullivan v. Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246 (N.D. Ca. 1978).

interest." *Ins. Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S.694, 702, 102 S.Ct. 2099, 72 L. Ed. 2d 492 (1982). Without personal jurisdiction, a court is not authorized to bind a party. It naturally follows that the district court's attempt to bind Petitioners, as well as the circuit court's approval, are clearly violative of Petitioners' Constitutional Due Process Guarantees.

**2. Personal Jurisdiction Could Not Be Acquired Over Putative Class Members Who Were Never Notified, After The Conditional Settlement Class Failed**

The characterization of a suit as a class action suit does not lessen the due process guarantee afforded to litigants. In fact, because of the unique situation class actions present (the representation of numerous plaintiffs by a few representative plaintiffs and chosen class counsel), FED.R. CIV.P. 23 embodies not only the procedural process necessary, but the substantive due process protections guaranteed by the Due Process Clause of the Federal Constitution. Judgment in a class action does not bind those members who were not given notice. *Anderson v. John Morrell & Co.*, 830 F.2d 872, 877 (8th Cir. 1987).

Both the district court's and the circuit court's decisions fly in the face of this Court's mandate of explicit compliance with FED.R. CIV.P. 23's requirements. Specifically, that individual notice of a pending class action suit be provided to all putative class members, informing members of the pendency of the suit, its subject matter and of their ability to opt-out. *See, e.g., General Telephone Co. v. Falcon*, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

After the conditional settlement class failed, the district court failed to notify Petitioners that the *Becherer* Plaintiffs and their counsel would represent Petitioners on Petitioners' remaining claims against all defendants. Nor did the district court provide Petitioners with the opportunity to opt-out. "[T]he opportunity to opt-out [is] an essential component of personal jurisdiction in lieu of the more traditional minimum contacts." *Carlough, supra* at 200; *See also, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ([a] class member "may request exclusion from the actions and thereby preserve his opportunity to press his claim separately."). It is a procedure that provides minimum due process requirements, insuring that no

putative class member will be deprived of property without due process of law. *See e.g., Phillips, supra* at 807 ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.").

By failing to provide the requisite notice and opportunity to opt-out, the district court extinguished certain mandatory options, specifically, Petitioners' right to remove themselves from the litigation. "[I]f he takes advantage of that opportunity [to opt-out] he is removed from the litigation entirely." *Phillips, supra* at 810. See also, *Herbert v. Monsanto Co.*, 576 F.2d 77 (5th Cir. 1978) (Opting out of a class is akin to a dismissal without prejudice, the party opting out retains both the procedural and substantive rights enjoyed prior to the commencement of the suit. Accordingly, the party is free to commence his own action.); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 781 (3d Cir. 1975) ("Rule 23 by its own terms creates a mechanism leaving parties in a b(3) action free to continue with any state proceedings . . . .").

Due process, as well as the requirements of FED.R. CIV.P. 23, are not merely window dressing. As this Court stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1949), "[W]hen notice is a person's due process, process which is a mere gesture is not due process." Similarly, when notice and an opportunity to opt-out is a person's due process, notice and opportunity to opt-out which is a mere gesture is not due process. Here, the district court failed to provide even the mere *gesture* that due process guarantees demanded.[9]

After the conditional settlement class failed, Petitioners were entitled to notice and an opportunity to opt-out of subsequent litigation. Yet, the district court never notified Petitioners that their claims against Merrill Lynch were going to be adjudicated. Furthermore, they were not afforded the opportunity to opt-out,

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[9] Equally alarming is the district court's action in light of its knowledge that the majority of Petitioners' opted-out of the conditional settlement class, preserving their claims against all defendants. By later binding Petitioners to the judgment against Merrill Lynch, the district court transformed Petitioners' right to opt-out into an exercise in futility.

violating Petitioners' rights to due process.[10]

### 3. Virtual Representation Is Not a Substitute For The Requirements of Due Process

Although the circuit court vacated the obstructive injunction, it remanded the case to the district court for a determination of whether Petitioners' claims are barred under the doctrine of "virtual representation," apparently assuming that a finding of virtual representation provides an acceptable substitute for personal jurisdiction and due process demands. Virtual representation allows a court with personal jurisdiction to bind a person technically not a party to a prior action if his interests were so substantially similar to a named party's that that party was his 'virtual representative' in the first action." *See*, *McArthur v. Scott*, 113 U.S. 340, 392, 5 S. Ct. 652, 28 L.Ed 1015 (1885).

The concept of "virtual representation" originated in the area of wills and estates "by courts of equity on considerations of sound policy and practical necessity . . . ." *Id.* at 404. The sound policy reasons and practical necessity justifying application of the "virtual representation" doctrine are absent, however, when the potential parties are known, ascertained individuals. Furthermore, application of the virtual representation doctrine in such instances is violative of the constitutional guarantee of Due Process and, in any case, may be applied only by a court having personal jurisdiction over the party against whom the doctrine is invoked. Accordingly, the circuit court erred when it remanded the instant case to the district court (which lacks personal jurisdiction) for a determination of whether Petitioners were bound by the district

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[10] The absence of personal jurisdiction also insulates Petitioners from the concepts of *res judicata*. "[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no *res judicata* effect as to that party." *Phillips*, *supra* at 805. "Without a valid notice and an opportunity to opt-out there can be no *res judicata* effect given to judicial determinations of the claims of unrepresented parties." *Jones v. Diamond*, 594 F.2d 997, 1023 (5th. Cir. 1979).

Regardless of the inapplicability of *res judicata*, the district court should refrain from visiting its merits because "the court conducting the action cannot predetermine the *res judicata* effect of the judgment, this can only be tested in a subsequent action." *Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th. Cir. 1973).

court judgment pursuant to the doctrine of virtual representation.

Virtual representation was created in the area of wills and estates to resolve the conflict between the need for finality of estates with the attendant complications of future interest that often involved unknown, unascertained or unborn persons. *Benner & Co. v. Atlas Remainder, Inc.*, 407 F.2d 219, 221 (6th Cir. 1969). Without imposition of the doctrine, estates would remain in limbo for an indefinite period of time. "[S]uch a proposition is too 'ify', to freeze the rights of all the parties involved until such things which may never happen might not happen." *Webster v. State Mut. Life Assur. Co.*, 50 F.Supp 11, 14 (S.D. Cal. 1943). Thus, at its roots, virtual representation was cautiously applied in narrow circumstances, warranted by necessity.

Because necessity generated the concept of virtual representation, it necessarily follows that the absence of necessity negates its use. In *Pugh v. Frierson*, 221 F.513, 524 (6th Cir. 1915), the circuit court recognized that "the only reason for that rule was the necessity of the case . . . ." Accordingly, virtual representation does not apply to infant heirs that were in being and ascertained at the time of the initial proceeding. "[T]he rule will not be applied where the representation relied on does not appear to have been . . . necessary." *Id.* at 526.

The "necessity" justifying the inception, as well as the application, of the virtual representation doctrine is undoubtedly absent in the present situation. Not only are Petitioners known, ascertained beings, they have hired their own counsel and initiated legal action, affirmatively rejecting representation by the *Becherer* Plaintiffs and their counsel.

In addition to the absence of the circumstances legitimatizing the doctrine of virtual representation, its application to establish personal jurisdiction over nonparties (and perhaps application at all outside of the arena of wills and estates) violates fundamental guarantees of due process. "The principle is as old as the law and is of universal justice, that no one shall be personally bound until he has had his day in court . . . ." *Mason v. Eldred*, 73 U.S. 231, 239, 8 L. Ed. 738 (1868). Due process requires, at a minimum, notice and opportunity to be heard. *Mullane, supra* at 313. Application of the doctrine of virtual representation to acquire personal jurisdiction over known, ascertained individuals nullifies the commands of *Mullane* and extinguishes a personal cause of action, violating rights guaranteed by the Due Process Clause of

the Constitution.

A second component for the application of virtual representation is adequate representation. *Pugh, supra* at 526. Adequate representation alone, however, does not satisfy the requirement of due process. This Court's decision in *Eisen, supra* at 177 is analogous: "Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it." Rule 23's requirement of notice and an opportunity to opt-out was designed to fulfill the requirements of due process. *Id.* at 173-74. If adequate representation cannot substitute for notice required under Rule 23, then it defies logic to suggest that it can substitute for personal jurisdiction or notice and the opportunity to be heard as required by the Due Process Clause. Accordingly, the district court's decision to the contrary violated Petitioners' right to Due Process.

**4. The District Court's Notice Misled Petitioners**

The district court *never* notified Petitioners that their claims against Merrill Lynch would be adjudicated. Quite the opposite, the district court's notifications to the SSG class provided that the SSG class action was limited to contract claims against the SEG defendants. Likewise, the conditional class settlement notified Petitioners that their claims against Defendants, other than their breach of contract claims against SSG Defendants, could be pursued individually.

The notices did not notify Petitioners that their claims against Merrill Lynch were going to be litigated for them despite their wishes. Indeed, to the contrary, they were specifically told that they could pursue their claims independently. After the conditional settlement class failed, Petitioners received no further notices from the district court. Notwithstanding the district court's clear notice to Petitioners that they would be free to pursue their own claims independently in the event settlement failed, the district court erroneously assumed personal jurisdiction over Petitioners and enjoined the exact litigation that the district court assured would remain viable. The district court's misleading notices and subsequent nullification of Petitioners' legal actions and arbitration proceedings, violates every notion of due process. In hindsight, it seems clear that the district court was reacting to the failed settlement rather than applying established principles of law.

During negotiations for the conditional settlement class, Merrill Lynch, for its obvious desire for finality, insisted that it retain the ability to back out of the settlement if a certain number of putative class members opted-out of the settlement class. At that time, Merrill Lynch recognized that parties that opted-out pursuant to FED.R. CIV.P. 23 would **not** be bound by any judgment. Merrill Lynch exercised its right to withdraw from the settlement, after many putative class members opted-out. While the settlement class failed, Merrill Lynch asserts that it is nevertheless entitled to the benefits of Rule 23 -- foreclosure of all further litigation by the absent class members. The district court is allowing Merrill Lynch to have its cake and eat it too, at the expense of Petitioners' due process guarantees.

The Supreme Court has recognized that "a cause of action for damages is a property right, and thus cannot be taken away without due process." *In re Real Estate*, 869 F.2d 760, 768 (3rd Cir.), *cert denied* 493 U.S. 821 (1989) (referring to *Mullane, supra* at 370). The misleading notices, as well as Merrill Lynch's manipulation of the class action apparatus to benefit itself, denied Petitioners their day in court (and in arbitration), and consequently their Constitutional right to Due Process.

**5. The Anti-Injunction Act Cannot Be Used Because The District Court Lacked Personal Jurisdiction**

The district court's issuance of an injunction under the Anti-Injunction Act, 28 U.S.C. §2283 ("Act"), as well as the circuit court's implicit approval of such an action, is a violation of the Act as well as basic Constitutional guarantees. While the circuit court vacated the obstructive injunction, it nevertheless erroneously remanded the action to the district court without holding that an injunction could not issue under the Act. The Act, however, is generally a prohibition of injunctions rather than a grant of authority. The Act does contain an exception for injunctions by federal courts "to protect or effectuate . . . judgments", but that exception must be narrowly construed. As this Court has explained:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of

> §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. [*Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).]

"It is clear beyond cavil that the [Anti-Injunction Act] prohibition is not to be whittled away by judicial improvisation." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 631, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977).

The district court, as well as the circuit court, failed to heed the narrow construction of the exceptions to the Act, especially in light of the fact that both lacked personal jurisdiction over Petitioners and their counsel. Personal jurisdiction is an essential prerequisite to enjoining putative class members. In *Carlough, supra*, the circuit court reviewed the "necessary in aid of jurisdiction" exception to the Anti-Injunction Act. It determined that the Anti-Injunction Act does not extinguish a "federal court's jurisdictional requisites . . . but rather the judicial authority extended by the Act[] is wholly derivative in nature. Thus the application of the Ant-Injunction . . . Act[] should have been *preceded* by the satisfaction of jurisdictional prerequisites." *Carlough* at 198.

> Thus, it would offend the Fifth Amendment's guarantee of due process for a federal court to enjoin an absentee class member whose minimum contacts with the forum have not been established or, in lieu of minimum contacts, who has not consented to the court's jurisdiction, explicitly or inferentially. [*Carlough* at 199 (citations omitted).]

The Anti-Injunction Act does not excuse the requirement that a court must have personal jurisdiction over the person it seeks to enjoin. Accordingly, the circuit court in *In re Real Estate*, stated that prior to notice and the opportunity to opt-out, and absent minimum contacts to the forum or consent to jurisdiction, a federal injunction enjoining a state action violates Due Process guarantees'. "Strictly and narrowly enforcing the requisite opportunity to opt-out for Rule 23 class plaintiffs before exerting personal jurisdiction comports with the overall class action mechanism and is derived from policy considerations bearing upon

comity and federalism. Here the district court's premature issuance of the injunction threatened to compromise these principles." *Carlough*, *supra* at 201.

These cases firmly establish that the Act does not provide a method of establishing personal jurisdiction over absent putative class members. If the district court cannot enjoin one over which it lacks personal jurisdiction to "aid its jurisdiction", then it necessarily follows that it cannot enjoin one over which it lacks personal jurisdiction to "protect or effectuate its judgments." The district court cannot constitutionally enjoin Petitioners before acquiring personal jurisdiction by providing notice ***and*** the opportunity to opt-out.

Because "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed," it naturally follows that the district court erred in issuing the injunction, especially in light of the absence of personal jurisdiction over those the injunction sought to enjoin. That court should not have the opportunity to so err again.

**6. The Obstructive Injunction Is Contrary To The Federal Arbitration Act And The Precedent Of This Court**

The Federal Arbitration Act ("FAA") requires that the claims of Petitioners be arbitrated and not subject to the personal or subject matter jurisdiction of the district court. The district court lacked personal jurisdiction over Petitioners, prohibiting the district court's interference with Petitioners' Florida arbitration proceedings. In addition to this flaw of Constitutional dimensions, the district court lacked subject matter jurisdiction by virtue Congress' command under the FAA.

Petitioners commenced arbitration proceedings against Merrill Lynch prior to the issuance of the district court's order and entry of final summary judgment in favor of Merrill Lynch and against the named class plaintiffs. Despite the undisputed contractual agreement to arbitrate any disputes between Petitioners and Merrill Lynch, the district court has interfered with Petitioners' Florida arbitration proceedings in direct contravention of this Court's consistent position that there is a strong federal policy favoring the arbitration of disputes. See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) and *Mastrobuono v. Shearson Lehman Hutton*, ___ U.S.

___, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

The FAA ensures "that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences v. Board of Trustees of Leland Standford Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). Thus, the Supreme Court has upheld the enforceability of an arbitration agreement, governed by Alabama law, despite an Alabama statute providing that arbitration agreements are unenforceable. *Allied-Bruce, supra*. "[T]he FAA not only 'declared a national policy favoring arbitration,' but actually 'withdrew the power from the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Mastrobuono, supra*, 131 L. Ed. 2d at 83 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)).

The reach of the FAA is not limited to state court actions, it also binds federal courts. When reviewing the applicability of the FAA to federal courts, this Court stated: "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter that Congress plainly has power to legislate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); see also *Southland, supra* at 12 (The FAA is "enforceable in state as well as federal courts.").

The FAA is designed to overcome court's historical notions of exclusive subject matter jurisdiction: "The need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . The courts have felt that precedent was too strongly fixed to be overturned without legislative enactment . . . ." *Southland* at 13 (citation omitted).

The district court in this instance has exhibited the jealousy the FAA is intended to eradicate. "Any statement made by any attorney suggesting that litigation can be commenced in state court by any class member who opts-out of the settlement is inappropriate inasmuch as this court has exclusive jurisdiction over this matter."[11] District Court's March 24, 1992 [Gag] Order at 4.

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[11] Neither the district court nor any party to the instant action, can support the bold assertion that the district court has "exclusive" jurisdiction over all of the claims. As discussed, the FAA and resulting case law are in direct conflict with the district court's assertion.

Thus, in addition to violating the Petitioners' contractual right to arbitrate their claims with Merrill Lynch and its employees, the decision of the district court also violates this established policy favoring arbitration and requiring that disputes be moved as quickly as possible from the courtroom to the arbitration hearing room.

## II. REVIEW IS NECESSARY BECAUSE THE DISTRICT COURT'S GAG ORDER, AND THE CIRCUIT COURT'S FAILURE TO PROVIDE RELIEF, VIOLATED PETITIONERS' DUE PROCESS AND FIRST AMENDMENT GUARANTEES

The Sixth Circuit, despite Petitioners' prayer for relief, failed to comment upon, nevertheless provide relief from, the Gag Order entered by the district court, and the resulting proverbial monkey hanging on Mr. Grady's back. "While the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 469 (5th Cir. 1980), *aff'd on other grds*, 452 U.S. 89 (1981). Because Mr. Grady may be foreclosed from challenging the constitutionality of the Gag Order as a defense in contempt proceedings, this Court provides his last opportunity to be free from sanctions flowing from the unconstitutional injunction. The Gag Order operated as an unconstitutional prior restraint of speech and had a chilling effect on speech and communications between Petitioners and their chosen counsel.

Inherent in the Gag Order is a prohibition on the ability of Petitioners' counsel to render independent legal advice to Petitioners and to fulfill the duties of an advocate. The Gag Order does not simply require communications to be "accurate"; it also requires that communications be "balanced." Clearly, there would be substantially less lawyers, as well as legal disputes, if there was but one "accurate" interpretation of any given document or circumstance. Good lawyers disagree daily on what is "accurate," yet the district court threatens sanctions to those who do not

convey "accurate" information.[12]

The Gag Order summarizes neither the law nor the standard of care which Petitioners' counsel is to follow in discharging his responsibility to his clients. It also fails to acknowledge that, within the bounds of applicable ethical rules, Petitioners' counsel could and perhaps would be required to advance positions even when contrary to existing law and, by definition, could zealously advocate those positions as being in the best interests of his client. The only means for measuring compliance with the Gag Order's requirement in the context of attorney-client communications would be through a repeated testing by motions for sanctions and civil contempt proceedings.

At a minimum, such proceedings lead to the wholesale abandonment of any attorney-client privilege (as evidenced by the *Becherer* Plaintiffs' counsel's filing of hundreds of pages of Petitioners' counsel's work product and attorney-client communications supposedly in support of their motion for sanctions). Such a result is untenable, and had, and continues to have, a clearly chilling effect on speech and communications between Petitioners and their counsel, and on advocacy in general.

The prohibition on attorney-client communications and attorney conduct is explicit in Paragraph 2 of the Gag Order where the district court specifically declared that "[a]ny statement made by any attorney suggesting that litigation can be commenced in state court by any Class member who opts-out of the settlement is inappropriate inasmuch as this court has exclusive jurisdiction over this matter." In other words, Petitioners' counsel is subject to sanctions for advising his clients of litigation, as well as arbitration, options which, in good faith, were arguably available to them notwithstanding the Gag Order. The district court made this statement despite its notice to putative class members on February 14, 1992 that, should they decide to request exclusion and opt-out of the proposed class, not only *could* they file their own suit but that they "will have to."

There is a heavy presumption that prior restraints are unconstitutional. *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975). As a result, prior restraints are subject to close scrutiny

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[12] This characteristic alone renders the Gag Order unconstitutionally vague and overbroad. *See Bernard*, 619 F.2d at 478, n.33.

and will only be upheld if they pass strict standards:

> [W]e have imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures. [*CBS Inc., v. Davis, Circuit Judge*, 510 U.S. __, 127 L.Ed. 2d 358, 361, 114 S.Ct. ___ (1994).]

It is difficult to imagine that an attorney's honest advice to his clients will result in great and certain evil. To the contrary, this is the role of a zealous advocate.

The Fifth Circuit in *Bernard*, held that a district court order banning communications by the parties or their counsel with class members without prior court approval was violative of the First Amendment as an unconstitutional prior restraint on protected expression as well as an inappropriate order under FED.R. CIV.P. 23(d)[13]. The Fifth Circuit's analysis, holding that order unconstitutional, is equally applicable to the Gag Order issued by the district court in this case.

The Gag Order has all of the hallmarks of a prior restraint as identified by the *Bernard* Court. It is judicial in origin, its sole purpose is suppression rather than punishment, the means of enforcement of the order is by contempt and the defense of constitutional invalidity would not be available in contempt proceedings. *Bernard* at 467-69. Indeed, when the district court expressly stated in the Gag Order that any suggestion that litigation could be carried on in other forums was inappropriate, it became "the essence of prior restraint of counsel it place[d] specific communications under the personal censorship of a judge." *Bernard* at 473.

"There is a strong presumption against the constitutionality of any prior restraint." *Id.* To be upheld, a restraint must be designed to prevent an expression that will otherwise "surely . . . result in

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[13] *In Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103-104, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981), the United States Supreme Court affirmed the Fifth Circuit's decision in *Bernard* on other grounds. Nevertheless, the Court did indicate that a First Amendment violation may have occurred:

> Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression.

direct, immediate and irreparable damage . . . ." *New York Times Co. v. U.S.*, 403 U.S. 713, 730, 91 S.Ct. 2140, 2149 L. Ed. 2d 822 (1971). Additionally, it "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *CBS, supra* at 238. Certainly, the ordinarily privileged discussions between an attorney and his clients regarding litigation strategies and options in pursuing civil claims could almost never result in such irreparable damage.

As the Fifth Circuit made clear in *Bernard*, such an order "is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23." *Bernard* at 474. Ironically, it was the district court that invited exactly the kind of communications that Petitioners sought with their counsel by telling Petitioners that "[i]n order to continue pursuing your claims (other than the specific breach of contract claims which were the subject of the court proceedings in trial between May 7, 1991 and May 17, 1991, against the SSG Defendants), *you will have to retain your own attorney and file your own suit, at your own expense.*"[14] Notice of Proposed Settlement and Conditional Class Action Certification at 20 (emphasis added). To subject Petitioners to this type of restraint after advising them to retain their own legal counsel is, simply, unconscionable.

While judicial limitations to protect class litigation is at times available, a district court must nevertheless be mindful of the limited nature of such a restriction. This Court has recognized the needs of putative class members to be fully apprised of the intricacies of the litigation and to be able "to obtain information about the merits of the case from the persons they sought to represent." *Gulf Oil*, 452 U.S. at 101. This Court held:

> [A]n order limiting communications between parties and potential class members should be based upon a clear record and specific findings that reflect a weighing of the need for a

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[14] Petitioners also believe that the Gag Order violates the First Amendment on grounds other than putting a prior restraint protected speech. By restricting their communications with their chosen counsel, the Gag Order violates their First Amendment association rights and the association rights of their counsel. *Bernard*, 619 F. 2d at 478, and cases cited therein.

> limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing--identifying the potential abuses being addressed--should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances. [*Gulf Oil* at 101-102.]

In *Gulf Oil* the Supreme Court found that the district court had failed to provide any indication that it had weighed the competing factors before entering the order. The Court further observed:

> The order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court drafting such an order, and attention to whether the restraint is justified *by a likelihood of serious abuses.* [*Gulf Oil* at 104 (emphasis added).]

Although there are differences in the factual settings in *Gulf Oil* and this case, many of those differences actually support the conclusion that the district court abused its discretion in entering the Gag Order. For example, the order in *Gulf Oil* was directed to attorneys and parties who had appeared before the court, whereas here the district court's order extends to attorneys not ever before it.[15] Further, the *Gulf Oil* order made a specific exemption for "communications between an attorney and his client or a prospective client who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney . . . ."

No such safeguard is contained in the instant Gag Order. To the contrary, the Gag Order contains specific limitations on what an attorney may discuss with his client regardless of whether the client approached the attorney for advice or had previously hired

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[15] Petitioners sole purpose in the Michigan proceedings, including the subsequent appeal, has been to contest the district court's unauthorized exercise of personal jurisdiction over Petitioners. Prior to the Gag Order, Petitioners had never appeared in any capacity in the district court proceedings.

the attorney with respect to proceedings other than the Michigan action. Finally, the Gag Order directly contravenes the district court's assurances:

> If you do not understand the legal consequences of exclusion from or inclusion in the Class, it is recommended that you consult with a lawyer or a personal advisor of your own choosing. [Notice of Proposed Settlement and Conditional Class Action Certification at 4.]

Like the district court in *Gulf Oil*, the district court here failed to make any specific findings or to hold an evidentiary hearing before entering the Gag Order. It simply states that the "court is concerned that Attorney Thomas R. Grady may not be communicating accurate, objective and legally sound analysis of the settlement and its ramifications to his clients."

***It is hard to avoid the conclusion that the true concern of the district court was more for the survival of the settlement than for the dissemination of accurate and objective information regarding the settlement***. To paraphrase the Fifth Circuit in *Bernard*, the choice between accepting the settlement and opting out of the settlement class to pursue their own claims was a choice for each of Petitioners to make. The district court should not have "freighted [this] choice with a ... ban that restricted ... access to information and advice concerning the choice." *Bernard*, 619 F. 2d at 477.

## CONCLUSION

Review of this Petition is warranted because the Sixth Circuit Court of Appeals has sanctioned the district court's unfathomable departure from the accepted and usual course of judicial proceedings by ignoring this Court's standards for Personal Jurisdiction, Due Process and First Amendment Guarantees. This departure will have a major jurisprudential impact on Constitutional Guarantees of not only Petitioners, but all claimants confronted with class action opt-out issues, who may choose to pursue their individual legal claims in reliance upon a court's notice describing class certification. Accordingly, Petitioners respectfully request this Court to grant this Petition for Writ of Certiorari.

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DATED: May 26, 1995

No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1994

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J. DON ADAMS, et al.,

Petitioners,

RICHARD C. BECHERER, et al.,

Plaintiffs/Respondents,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

Defendants/Respondents.

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APPENDIX

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**APPENDIX**
**TABLE OF CONTENTS**

PAGE

Appendix A
Sixth Circuit Opinion, 43 F.3d 1054 . . . . . 1a

Appendix B
District Court Opinion, 809 F. Supp 1259 . . . . . 1b

Appendix C
District Court Amended Order And Injunction,
809 F Supp 1276 . . . . . 1c

Appendix D
Denial of Becherer Plaintiffs Petition for
Rehearing and Rehearing En Blanc (6th Cir.) . . . 1d

Appendix E
Sixth Circuit's Grant of Stay . . . . . 1e

Appendix F
Notice of Pendency of Class Action . . . . . 1f

Appendix G
Notice of Proposed Settlement and
Conditional Class Action Certificate . . . . . 1g

Appendix H
March 24, 1992 Order . . . . . 1h

Appendix I
Applicable Constitutional and Statutory Provisions . 1i

# APPENDIX A

Sixth Circuit Opinion, 43 F.3d 1054

BECHERER v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
Nos. 93-1049/93-1050/93-1051/93-1052/93-11-64/93-1221

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
43 F.3d 1054; 1995 U.S. App. LEXIS 290; 1995 FED App. 9
1995 FED App. 0009P (6th Cir.)

November 26, 1994, Argued
January 10, 1995, Decided
January 10, 1995, Filed

JUDGES: Before: KEITH, KENNEDY, and SUHRHEINRICH, Circuit Judges.

OPINION BY: KENNEDY

OPINION: [***2] [*1057] KENNEDY, Circuit Judge. This complicated commercial litigation arises out of the construction and sale of unit interests in a resort hotel. Plaintiffs are investors in the hotel and have filed suit against the hotel's developers, as well as against the broker, the escrow agent, and the financial institution involved in the sale of the hotel. The District Court held a bench trial on one of the contract claims and disposed of the balance of the contract, statutory, and fraud claims by granting several motions to dismiss and motions for summary judgment. The parties now appeal, challenging various aspects of the District Court's procedural and substantive rulings.

I.

We need first to identify the parties involved in this litigation. While plaintiffs are all investors in the hotel, we have before us two groups of plaintiffs. The District Court certified the two groups as a class only as to two contract [***3] claims against Shelter Seagate Corporation (hereinafter "SSG"). nl The named plaintiffs (hereinafter "Becherer plaintiffs") are a group [**2] of investors who filed suit in the United States District Court for the Eastern District of Michigan and who sought to have

their suit certified as a class action. The group of investors referred to in our case caption as "J. Don Adams, et al." (hereinafter "Florida plaintiffs") contend that, with the exception of the class contract claims, they are not bound by the District Court's decisions and should be able to pursue their own action in Florida state court.

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n1 The District Court also later certified a conditional class action for purposes of settlement, but the settlement collapsed, vitiating the class certification.

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SSG is the entity responsible for the development, construction, and operation of the hotel. SSG is affiliated with Can-American Corporation and Can-American Realty Corporation. All three corporations are owned by Garrett Carlson, Graham Lount, and Arni Thorsteinson.

[*1058] Merrill Lynch, Pierce, Fenner & Smith, Inc. acted as the exclusive selling agents for the hotel interests. TrustBank Mortgage Center, [**3] Inc. (hereinafter "TMC"), formerly known as Dominion Financial & Investment Corporation, approved potential investors and provided financing for some of the investors. TMC is now in receivership and is operated by the Resolution Trust Corporation. Midwest Title Guarantee Company of Florida (hereinafter "Midwest") acted as agent for the closing escrow account.

II.

SSG incorporated in December 1983 for the purpose of developing and constructing The Registry Hotel, a non-residential, luxury condominium resort complex at Pelican Bay in Naples, Florida. SSG raised money to finance the hotel by selling interests in the hotel through a private [***4] placement. Between

February 1984 and April 1985, investors entered into contracts with SSG for the purchase of hotel units. Each hotel unit cost between $ 179,500 and $ 278,000 and included a fully furnished hotel room or suite, a percentage interest in the hotel's common areas, and a percentage interest in the hotel's future profits. The investors appointed SSG as their agent, authorizing it to rent hotel units, collect pool revenues, pay operating expenses, and distribute cash dividends to the investors at regular intervals.

Merrill Lynch acted [**4] as the exclusive selling agent for the hotel interests and provided potential investors with a Private Placement Memorandum (hereinafter "PPM"), which described the offering in detail. The purchase agreement between SSG and each investor is set forth in a document entitled "Unit Sale Agreement," and in other documents incorporated by reference therein. To "subscribe" for a hotel interest, each prospective investor submitted to Merrill Lynch an executed Unit Sale Agreement, a ten percent down payment, and various documents related to financing the balance of the purchase price. Merrill Lynch held the Unit Sale Agreements and the down payments in an interim escrow account, pending the fulfillment of certain conditions. According to the terms of the offering, Merrill Lynch was to turn the contents of the interim escrow account over to Midwest only after these conditions were satisfied. Midwest was to then place the documents in the closing escrow account until the closing of the sale.

Investors were free to cancel their purchase agreements until two conditions were fulfilled: n2 Merrill Lynch received subscriptions for all units and TMC approved each investor for financing. It took eight [**5] and one-half months to obtain subscriptions for all the interests and another [***5] three and one-half months for TMC to approve investors' mortgage applications. In these latter three and one-half months, some investors withdrew and were replaced.

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n2 These are the same conditions for the closing of the interim escrow account.

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The interim escrow account closed on February 15, 1985, at which time the investors became obligated to complete their purchases. Consequently, under the terms of the contract, SSG had until February 15, 1987 to substantially complete the hotel and close the sale. Because SSG elected to close the sale on October 31, 1986, the District Court found that SSG waived whatever time remained in the two-year completion period and obligated itself to deliver a substantially complete hotel by the closing date, October 31, 1986. The District Court also found that SSG did not fulfill its requirements, as the hotel was not substantially complete at the time of closing.

The procedural history of the case, as well [**6] as additional pertinent facts, will be discussed where appropriate.

III.

Issues Regarding Pretrial Procedure

A. Discovery

In their factual and procedural history section, the Becherer plaintiffs drop a footnote to comment that the District Court denied them the opportunity to take discovery of Laventhol & Horwath, the accounting firm retained by SSG. This issue was not, however, raised in either the statement of issues or the argument sections of their brief. Thus, it [*1059] has not been properly raised before this Court, and we will not address it. see *United States v. Lanier, 33 F.3d 639 (6th Cir. 1994).*

[***6] B. Requirement that Plaintiffs Replead Fraud Claims as Breach of Contract Claims

The District Court, acting pursuant to its powers under Fed. R. Civ. P. 16, n3 held an initial status conference on April 23, 1990. The Becherer plaintiffs challenge two actions arising out of that conference. First, they allege that the District Court violated their substantive rights by forcing them to forego valid fraud claims and to replead their claims under a breach of contract theory. This allegation is patently meritless. The District Court did not require [**7] that the Becherer plaintiffs forego their fraud claims. Indeed, a review of the District Court's opinion shows that the court addressed both the breach of contract and the fraud claims. Because the Becherer plaintiffs continue to pursue their fraud claims after amending their complaint, we cannot see how they suffered any prejudice.

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n3 Rule 16 provides:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

Fed. R. Civ. P. *16.*

- - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

[***7] At the pretrial conference the court [**8] also categorized all of the Becherer plaintiffs, claims into three areas of fraud:

1) whether the offering materials fraudulently omitted the true identity and competitive impact of a proposed Ritz-Carlton hotel;

2) whether defendants fraudulently leased [furniture, fixtures, and equipment]; and

3) whether defendants fraudulently closed on the sale of the hotel interests.

In a footnote in their factual section, the Becherer plaintiffs claim they identified a fourth area of fraud, which the District Court ignored: whether defendants fraudulently extended the offering after they told the investors that the investors were irrevocably bound because the offering had been fully subscribed. It is far from clear that this issue was pursued in the district court. In addition, the Becherer plaintiffs did not raise this issue in either the statement of issues or the argument sections of their brief. It is subsumed somewhat in their issue regarding the "breach of interim escrow duties" claim. Thus, to the extent it is raised, we will address it under that issue. To the extent it is not part of that claim, it has not been properly raised before this Court, and we will not [**9] address it. See United *States v. Lanier, 33 F.3d 639 (6th Cir. 1994).*

IV.

Issues Regarding Closing of Sale Claims

A. Dismissal of Contract Claims for Failure to Prove Damages

The District Court held a bench trial on one of the Becherer plaintiffs, breach of contract claims against SSG. In that claim, the Becherer plaintiffs alleged that SSG violated the Unit Sale Agreements by closing the sale on the hotel before it was substantially complete. At the trial, the Becherer plaintiffs presented the testimony of Phillip [***8] Levin, a management consultant, to support their contention that the hotel lost money due to the delay in substantial completion.

After reviewing the evidence presented, the District Court found that SSG closed the sale before the hotel was substantially complete, and thus, breached the Unit Sale Agreements. After reaching this conclusion, the District Court reviewed Levin's testimony and Florida law on calculating damages. On the basis of this law and evidence, the District Court concluded that the plaintiff class had not carried "their burden of proving that they were damaged as a result of the aforementioned breaches." *Becherer v. Merrill Lynch, Pierce, Fenner &- Smith 799 F. Supp. 755, 766 [*1060] (E.D. Mich. 1992). [**10]* The hotel was completed before the two years expired, and opening it early enabled it to make a profit during that interim period. The District Court was not clearly erroneous in finding that the plaintiff class was not damaged by this breach

The Becherer plaintiffs argue that the District Court had announced it was only trying liability, not damages, so they did not present proofs on the issue of damages. According to the Becherer plaintiffs, this was an improper modification of the pretrial order. This claim cannot succeed. Regardless of what the District Court might or might not have said in pretrial conferences, the fact remains that the Becherer plaintiffs presented evidence, in the form of expert testimony, regarding their damages. on appeal, they have not pointed to any damages evidence that they were

unable to present. Accordingly, the District Court did not violate their substantive due process rights.

B. Denial of Rescission Remedy

The Becherer plaintiffs also take issue with the District Court's refusal to allow rescission as a remedy for SSG's breach. The Becherer plaintiffs argue that the District Court reneged on its pretrial representations that they would be entitled [**11] to rescission of their investments if they proved a breach of contract. In support of their contention, [***9] they point to the District Court's November 1990 opinion, as well as comments made at the May 7, 1991 pretrial conference.

We have reviewed the District Court's November 1990 opinion, and it contains no implication, let alone an explicit promise, that Becherer plaintiffs would be entitled to rescission if they established a breach of contract. In any event, it does not matter what the District Court might or might not have indicated in anticipation of the trial on this issue. what matters is whether the District Court's decision not to allow rescission was erroneous.

The Becherer plaintiffs argue that section 8 of the Unit Sale Agreement specifically allows them to choose rescission as a remedy for breach. SSG and Merrill Lynch dispute this contention. It is clear as a matter of Florida law that the Becherer plaintiffs are not entitled to rescission of the contract simply because SSG closed on the sale prematurely:

Although as a general rule parties to a contract may strictly enforce its terms and the courts will not rewrite an agreement to undo the consequences of a bad bargain, [**12] . . . the Florida courts do not blindly sanction unilateral termination of contracts when a default causes no harm to the party seeking to avoid performance.

Consistent with this principle, the Florida courts have indicated that the materiality of a breach is relevant when a party seeks to terminate or rescind a contractual relationship.

*Burger King Corp. v. Mason, 710 F.2d 1480, 1490 (11thCir. 1983),* cert. denied, *465 U.S. 1102, 80* L. *Ed. 2d 130, 104 S. Ct. 159-9* (1-984)(citations omitted).

To further support their rescission argument, the Becherer plaintiffs note that the District Court found that SSG had breached the Unit Sale Agreement by leasing [**10] furniture, fixtures, and equipment (hereinafter "FF&E"). According to the Becherer plaintiffs, this material breach was enough under section 8 to allow them to rescind the contract. Section 8, however, provides for rescission only in the event that SSG did not close on the sale within two years from the date the interim escrow closed. It does not provide for rescission should SSG wrongfully lease FF&E.

C. Summary Judgment as to SSG on Closing Fraud Claims [**13]

The District Court granted summary judgment in favor of SSG on the Becherer plaintiffs, claim that SSG defrauded them by closing prematurely. Claims for fraudulent misrepresentation or concealment of a material fact are actionable in Florida. *Department of Transp. v. Southern Bell Tel., 635 So. 2d* 74, 78 *(Fla. Dist. Ct. App. 1994).* An essential element of such a claim, however, is that the party alleging fraud must have suffered injury as a result of relying on the misrepresentation. Id.

[*1061] Here, the District Court found that the Becherer plaintiffs suffered no monetary damages as a result of the premature closing, a finding that has not been challenged on appeal. The Becherer plaintiffs, however, argue that they were injured because they suffered the deprivation of a legal right. According to the Becherer plaintiffs, if they had known that the hotel was not substantially complete at the time of the closing, they

would have taken legal action to prevent the closing or cancel their subscriptions. Thus, they contend that the fraud prevented them from exercising their legal rights.

This argument cannot succeed; it is far from clear [**14] that the Becherer plaintiffs could have bettered their position by preventing the closing or that they could have withdrawn from their agreements with SSG. SSG was entitled to further time under the contract. Postponing or preventing the closing would have only delayed the opening of the hotel. As defendants point out, the winter months are crucial to the Florida resort hotel business. By opening [***11] early, perhaps prematurely, SSG was nevertheless able to bring in money by renting rooms and hosting conventions. The hotel is making money.

The Becherer plaintiffs have not presented evidence of an injury sufficient to allow them to proceed on their fraud claims against SSG arising out of the premature closing. Accordingly, the District Court did not err in disposing of these claims.

D. Summary Judgment as to Merrill Lynch on Closing Fraud Claim

The Becherer plaintiffs accuse Merrill Lynch of violating its responsibilities under 17 C.F.R. §§ 240.10b-9 n and [***12] §§240.15c2-4 n5 in two respects. First, they allege that Merrill Lynch closed the interim escrow account despite the fact that the offering was not fully subscribed until April 1985. Second, the Becherer plaintiffs allege that Merrill [**15] Lynch permitted the sale closing to occur and accepted the balance of its fee despite knowing that the hotel was not substantially complete.

---------- Footnotes ----------

n Rule 10b-9(a) provides:

It shall constitute a manipulative or deception device or contrivance, as used in section 10(b) of the Act, for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation:

(1) to the effect that the security is being offered or sold on an "all-or-none" basis, unless the security is part of an offering or distribution being made on the condition that all or a specified amount of the consideration paid for such security will be promptly refunded to the purchaser unless (i) all of the securities being offered are sold at a specified price within a specified time, and (ii) the total amount due to the seller is received by him by a specified date; or

(2) To the effect that the security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless (i) a specified number of units of the security are sold at a specified price within a specified time, and (ii) the total amount due to the seller is received by him by a specified date.
[**16]

n5 Rule 15c2-4 provides:

It shall constitute a "fraudulent, deceptive, or manipulative act or practice" as used in section 15(c)(2) of the Act, for any broker, dealer or municipal securities dealer participating in any distribution of securities, other than a firm-commitment underwriting, to accept any part of the sale price of any security being distributed unless:

(a) The money or other consideration received is promptly transmitted to the persons entitled thereto; or

(b) If the distribution is being made on an "all-or-none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (1) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto.....

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In addressing these claims, the District Court [**17] focused on the latter claim and found that Rules 10b-9 and 15c2-4 protect investors, funds when securities are sold subject to a minimum sales condition. Merrill Lynch satisfied these rules on [***13] February 15, 1985, when the minimum sales conditions were met and the escrow was closed, thus irrevocably [*1062] binding the investors. The conduct that plaintiff class n6 claims violated these rules occurred at or near the October 31, 1986 closing of title. Rule 10b-9 and 15c2-4 do not apply to Merrill Lynch's conduct, which occurred after the February 15, 1985 closing of escrow. Thus, plaintiff class Rule 10b-9 and 15c2-4 fraud claim must be dismissed . . . .

*Becherer, 799 F. Supp.* at 770.

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n6 Despite the fact that the District Court speaks of a "plaintiff class" here, no such class was certified as to this issue.

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Before discussing the Becherer plaintiffs, arguments, we need to review some of the background underlying this case. Two relevant escrow accounts existed in this case. The first one [**18] is often referred to as the "interim escrow account." Merrill Lynch acted as agent for this account. Merrill Lynch closed the offering and the interim escrow account after the minimum subscription level was met and TMC approved the investors for financing. The contents of the interim escrow account were then transferred into the closing escrow account. Midwest served as escrow agent for this second escrow account. In the PPM, Merrill Lynch specifically disclaimed any responsibilities for supervising the status of the completion of the hotel: "Neither Selling Agent nor any of its affiliates has

undertaken to Investors to monitor construction of the Hotel or to inspect the Hotel upon its completion."

The Becherer plaintiffs present three reasons to support their contention that the District Court erred in dismissing their fraud claims against Merrill Lynch. First, they claim that the District Court's own findings of fact state that the minimum subscription level was not attained until April 1985, almost two Months after the closing of the interim escrow account.

[***14] Although the Becherer plaintiffs have not identified the findings of fact to which they refer, we assume they are referring [**19] to the findings in the District Court's August 7, 1992 order. In those factual findings, the District Court does state that "between February, 1984, and April, 1985, plaintiff class entered into contracts with SSG for the purchase of Hotel Units in The Registry Hotel . . . . *11 Becherer, 799 F. Supp. at* 762. Later on in his factual findings, however, the district judge declared, "I find that investors became irrevocably bound, to complete their purchases on February 15, 1985, the day their funds were delivered into escrow . . . . *11* id. *at 763.* This latter finding would seem to imply that the offering was sufficiently subscribed on February 15, 1985, when the interim escrow account was closed.

While it can be argued that these findings are in conflict, they can also be reconciled. It is conceivable that the offering was sufficiently subscribed at the time the interim escrow account was closed, but that investors were allowed to back out after that date. Merrill Lynch then found substitute investors, which could explain why the District Court found that investors executed Unit Sale Agreements as late as April 1985.

It is also [**20] conceivable that the "minimum subscription level,, was something less than 100%. The parties have not defined that term for us, and we decline to hunt through the thousands of pages that comprise the record in this case. If

"minimum subscription level" does not mean "fully subscribed " then it is possible that new investors could have been accepted after the closing of the interim escrow account.

Because the Becherer plaintiffs have raised this issue on appeal, they bear THE burden of establishing that such explanations are clearly erroneous. Contrary to the Becherer plaintiffs' assertions, the District Court never made an explicit finding about when the minimum subscription level was reached. The Becherer plaintiffs [***15] have not directed our attention to any evidence that addresses this issue, nor have they said why the above reconciliation of the District Court's findings is not supported by the record.

In their second argument, the Becherer plaintiffs allege that the District Court erroneously concluded that Rules 10b-9 and 15c2-4 apply only to a minimum sales condition. This argument misconstrues both the [*1063] facts of this case and the context of the District Court's opinion. While the [**21] District Court did state that "Rules 10b-9 and 15c2-4 protect investors, funds when securities are sold subject to a minimum sales condition," put in context it is clear that the District Court was actually holding that the securities regulations apply to the interim escrow account and not to the closing escrow account. This interpretation is consistent with the plain language of the regulations, and the Becherer plaintiffs have provided us with no reasons and no authority to find that this interpretation is erroneous.

In their third argument, the Becherer plaintiffs contend that Merrill Lynch kept itself informed about the progress of the hotel construction and that it accepted its fees and allowed the premature closing to occur despite knowing that the closing conditions had not been met. Whether or not Merrill Lynch kept informed about the hotel progress is irrelevant. What is important is whether Merrill Lynch represented to the investors at any time that Merrill Lynch was assuming responsibility for monitoring the construction

progress. As we stated earlier, Merrill Lynch specifically disclaimed this responsibility in the PPM. The Becherer plaintiffs have not pointed us to any [**22] contrary evidence.

We affirm the District Court's decision to dismiss the Becherer plaintiffs, securities claims against Merrill Lynch.

[***16] V.

Issues Regarding FF&E Claims

A. Finding of Breach Regarding FF&E

As one of their myriad claims against SSG, plaintiffs accuse SSG of unlawfully decreasing the value of their investment by leasing various furnishings, fixtures, and equipment for the hotel. According to plaintiffs, SSG was to have leased only a telephone and a television set for each hotel unit. Plaintiffs assert that SSG had promised to purchase the balance of the FF&E and provide it to the investors as part of substantially completing the hotel prior to the closing.

The District Court certified a class action on the contract actions against SSG and found, as a matter of law, that SSG had breached its contractual obligation to fully furnish the hotel. On appeal, SSG contends that this conclusion is in error. According to SSG, the contract documents provided it with authority to lease in its prudent judgment and provided that the lease expenses would be a hotel operating expense. SSG also argues that it was understood from the beginning that SSG would lease a telephone and [**23] a television for each unit. as well as FF&E for the common areas that were normally leased in the hotel industry.

The PPM informed the investors that "SHELTER SEAGATE CORPORATION..... offers for sale 474 Hotel Interests, each consisting of a fully furnished nonresidential resort hotel unit of The Registry Hotel at Pelican Bay..... The dispute

over FF&E essentially boils down to an interpretation of the phrase "fully furnished.,, we find no error with the district court's decision and therefore affirm both the finding of a breach and the award of damages.

[***17] B. Dismissal of FF&E Fraud Claim against SSG and Merrill Lynch

In addition to their breach of contract claims regarding the leasing of the disputed FF&E, the Becherer plaintiffs also brought fraud claims against SSG and Merrill Lynch arising out of the same decisions. Because it had already awarded the Becherer.plaintiffs damages on the breach of contract claims, the District Court dismissed the fraud claims. According to the District Court, to do otherwise would amount to a double recovery.

The Becherer plaintiffs argue that the District Court erred in dismissing their FF&E fraud claims because the dismissal prevented them [**24] from pursuing judgments against all potential joint and severally liable parties. The Becherer plaintiffs also argue that the measure of damages would have been different under tort and under contract.

We do not find these arguments persuasive. SSG injured plaintiffs by leasing various FF&E that it should have provided. [*1064] The District Court awarded damages to plaintiffs under a breach of contract theory and found that these damages make plaintiffs whole. Plaintiffs, therefore, are not entitled to recover under any tort theory, as that would result in a windfall to plaintiffs. In addition, plaintiffs have not provided any evidence of bad faith, as is necessary to support a fraud claim.

C. Piercing the Corporate Veil

In awarding damages against SSG for leasing the FF&E, the District Court also pierced the corporate veil and held three of

SSG,s officers and two of SSG's affiliate corporations secondarily liable for the breach. In reaching this decision, the District Court relied primarily on two factors: that SSG was thinly capitalized and that the various documents advertising the offering put great emphasis on the expertise of SSG's parent corporations and their owners. SSG argues [**25] that this decision was erroneous.

[***18] As is true in most jurisdictions, Florida law holds that courts should generally be reluctant to pierce the corporate veil. *Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So. 2d 878, 882 (Fla. Dist. Ct. App. 1989).* Unlike some other jurisdictions, Florida has severely limited the circumstances in which courts can take such an action. Under Florida law, the corporate veil may not be pierced unless it is shown not only that one business entity dominated or was the alter ego of the other, but that the relationship was created or used in order to mislead or defraud creditors . . . . To make that determination the court may address the broader question of whether there was evidence of improper conduct on the part of the corporate entity or the individual in the formation or operation of the corporation *Id. at 881-82.* See also *Dania Tai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114 (Fla. 1984).*

SSG did not conceal its thin capitalization from investors, nor did it defraud or mislead its investors regarding this fact. Thus, this ground does [**26] not provide a basis for piercing the corporate veil.

The District Court also set out at length various quotations from documents discussing the expertise of Can-American, Can-American Realty, and the stockholders of those corporations in the development, construction, and operation of multi-family dwellings. One quotation was drawn from the PPM:

The Shelter Group of companies include Shelter Seagate Corporation's parent, Can-American Realty Corporation, and its parent, Can-American Corporation. Through various subsidiaries and related companies, the group is owned by Graham C. Lount, Garrett G. Carlson and Arni Thorsteinson.

> The group is engaged in the acquisition, development and syndication of residential and commercial properties in [***19] the United States and Canada, including the development (but not operation) of hotels in both countries.

Becherer, 799 F. Supp. at 789. Four other Quotations were drawn from the Merrill Lynch Marketing Guide. we set out the first three of these quotations seriatim:

> Shelter--Seagate Corp., ("SSG"), is a newly formed corporation, organized for the purpose of developing The Registry Hotel at Pelican Bay. SSG is [**27] a wholly owned subsidiary of Can-American Realty Corp., and through a number of holding companies, Can-American Realty Corp., is ultimately owned by Graham C. Lount, Garrett G. Carlson, and Arni Thorsteinson. The audited net worth of Can-American is $ 18,000,000. Fair market net worth is in excess of $ 50,000,000. Total assets are in excess of $ 350,000,000.
>
> . . . .
>
> In addition, Can-American is currently developing three additional properties in Naples and Pelican Bay besides The Registry:
>
> . . . .
>
> The management of SSG, Gary Carlson, Graham Lount, and Arni Thorsteinson, bring to the project substantial development expertise. They have been actively engaged in the design, construction, financing, development and management of [*1065] over 18,000 units of multi-family housing in the U.S. and Canada.

*Id. at 790.*

The final quotation, as we said earlier, is also drawn from the Marketing Guide. It is from the section entitled "Objections Clinic," and apparently provides advice to [***20] agents for responding to various possible questions by investors:

> Q. The start-up of a new venture is terrifying to me. Too much can go wrong. I want no part [**28] of being a trailblazer.

A. So was my first date. Seriously, nothing ventured; nothing gained. We have an experienced Developer, acquainted with the area, already developing property in the area; granted, not Hotel property, but still a Developer able to complete deals in Pelican Bay. And we have a proven "par excellence" Hotel Manager in The Registry Hotel Corp. Also remember, the Developer is taking all the construction risks. There are risks in this venture, but you, the Investor, are "in bed" with some very classy partners.

Id.

On the basis of these quotations, the District Court concluded that

Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Graham C. Lount, and Arni Thorsteinson held themselves out to investors as the developer of The Registry Hotel, capable of fulfilling Shelter Seagate Corporation's contractual obligations.

Id.

The only quotations that could support this conclusion are second and fourth ones drawn from the Merrill Lynch Marketing Guide. Merrill Lynch developed this Guide for in-house use only; it was not to be distributed to investors. In issuing its factual findings on this issue, the District Court [**29] made no findings as to whether any investors received or relied on this Guide. id. at 789-90. Moreover, plaintiffs have pointed to no evidence that SSG was involved in the drafting of this Guide or that SSG [***21] approved any disbursement of the Guide to investors. Accordingly, there is no evidence that SSG, its affiliates, or shareholders misled or defrauded plaintiffs. The District Court erred in piercing the corporate veil. We therefore reverse the District Court on this issue.

VI.

Issues Regarding Miscellaneous Claims

A. Summary Judgment on Plaintiffs, Projections Claim

The Becherer plaintiffs accuse Merrill Lynch of providing materially false and misleading projections in the PPM. Specifically, they attack the alleged failure to disclose the.construction of a nearby Ritz-Carlton hotel and the alleged promise that all FF&E would be purchased, not leased. On November 19, 1990, the District Court granted summary judgment in favor of Merrill Lynch on this claim.

The District Court has adequately and correctly addressed all the arguments that the Becherer plaintiffs raise on appeal with respect to the Ritz-Carlton. Accordingly, we affirm the District [**30] Court on that issue for the reasons stated in its opinion. *Becherer, 799 F. Supp. at 781-84.*

The District Court did not, however, directly address the Becherer plaintiffs, claims regarding the FF&E projections. A review of the record explains why. The Becherer plaintiffs did not provide any evidence to support this claim until June 25, 1992, in connection with a motion for reconsideration of the court's November 19, 1990 order and a motion for summary judgment on other issues. The affidavits relied upon by the Becherer plaintiffs, both below and on appeal, were not filed with the District Court until the morning of the scheduled hearing on their motions. The District Court refused to consider these affidavits, essentially holding that they were untimely filed. The Becherer plaintiffs have not provided any explanation for [***22] the tardy filing. n7 Thus, the District Court did not abuse its discretion in refusing [*1066] to consider the affidavits. Without that evidence, the Becherer plaintiffs have not fulfilled their burden of proof, and the District Court's grant of summary judgment on this issue was proper.

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n7 We also note that the Becherer plaintiffs did not even allege that the District Court erred in refusing to admit these affidavits until their reply brief. ordinarily, we will not consider assignments of error raised so late in the appeal process.

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B. Breach of Interim Escrow Duties by Merrill Lynch

The Becherer plaintiffs argue that Merrill Lynch breached its duties as interim escrow agent by allowing that escrow to close without disclosing the following information to investors:

1) the minimum subscription level was not met at the time of the interim escrow closing;

2) SSG intended to lease FF&E;

3) the financial projections provided to investors did not factor in the cost of leasing the FF&E; and

4) TMC never provided notice of financing approval to investors.

All four allegations can be disposed of easily. First, the District Court found that investors became bound to complete their purchases on February 15, 1985. This finding contains an implicit conclusion that the minimum subscription level was met at the time of the interim escrow closing. The Becherer plaintiffs point to no information that would allow us to find that this conclusion was clearly erroneous. Thus, we will not overturn it on appeal.

[***23] Second, we have reviewed the District Court's opinions in this case and find no discussion of when Merrill Lynch learned of SSG's intention to lease the disputed FF&E and whether Merrill Lynch [**32] thought that intention contravened the contract. Nor have the Becherer plaintiffs pointed to any part of

the record to show they raised this argument below. We will not address it for the first time on appeal.

Merrill Lynch points to evidence that it reduced its commission so that the project could be completed as promised and that it believed that, with these concessions, SSG could fulfill its end of the contract.

We earlier addressed the Becherer plaintiffs, allegations regarding Merrill Lynch's projections and SSG's decision to lease FF&E. We will not repeat that discussion here, except to say the claim has no merit.

Finally, the District Court specifically found that "plaintiffs waived their right to be notified of financing approval by not objecting to the lack of notice of such approval within a reasonable time period after they received notice of the escrow closing." *Becherer, 799 F. Supp. at* 789. The Becherer plaintiffs have provided no reasons why this conclusion was in error, and we will thus not overturn it on appeal.

C. Land Sales Act

As part of their complaint, the Becherer plaintiffs raised a claim under the Land Sales Act, 15 U.S.C. § 1701 [**33] et seq. This statute makes it unlawful for any developer or agent to defraud or deceive a purchaser with respect to the sale of a non-exempt lot. The initial dispute in this case is whether the hotel units marketed by Merrill Lynch are exempt from the requirements of the Act.

The Act provides an exemption for, among other things, "the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years . . . . " *15 U.S.C.* § 1702(a)(2). The District Court found that the two-year period started [***24] running on February 15, 1985, with the closing of the interim escrow account, as it was only then

that the parties became legally bound under the Unit Sale Agreements. Because the plain language of the Unit Sale Agreements required SSG to erect the hotel within two years of that date, the District Court found that this transaction was exempt from the terms of the Land Sales Act.

On appeal, the Becherer plaintiffs argue that this conclusion was in error. According to them, the two-year time period began running from when the first investor signed a Unit Sales Agreement in February 1984. To [**34] support this interpretation, they refer to a HUD regulation, 24 C.F.R. § 1710.5(b), discussing exemptions from the Land Sales Act.

This argument cannot.succeed. First, there is substantial doubt about whether this regulation applies to the present transaction. The language on which the Becherer plaintiffs [*1067] rely was added as part of an August 6, 1984 amendment. It is not clear whether this amendment is retroactive. Second, even if the amended regulation applies, it speaks of presale clauses that are "legally binding." As the District Court found, none of the parties to the present transaction became legally bound until the closing of the interim escrow account on February 15, 1985.

Although the District Court reached the correct result on the "two year" question, it incorrectly thought that the analysis stopped there. It is not enough to find that the contract requires completion of the hotel in two years.

Under the terms of the statute, the contract must "obligate" the developer to complete construction in two years. According to the Becherer plaintiffs, SSG was not "obligated" to build the hotel, as the Unit Sale Agreements contain a clause limiting possible remedies for a breach [**35] by excluding the possibility of damages.

While the statute does not elaborate on the meaning of "obligation," the regulations do. In the Code of Federal [***25]

Regulations, HUD discusses possible contractual limitations on buyers' remedies:

> HUD's interpretation of what constitutes a two-year obligation to construct a building relies on general principles of contract law in deciding whether or not the seller has, in fact, an obligation to erect a building within two years. Provisions for purchaser financing and remedies clauses are matters to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located.
>
> However, the contract must not allow nonperformance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. . . .

24 C.F.R. Pt. 1710, App. A, subpt. IV(b). As part of this subsection, HUD also notes that state law may affect the outcome of various cases under this statute:

> Because of the variations in applicable contract law among the states and the many different provisions that [**36] are used by sellers in construction contracts, HUD may condition its advisory opinions under this exemption on representations by local counsel as to the current status of state law on the relevant issues. For example, in the Florida case of *Dorchester Development, Inc. v. Tema Burk, Schwartz & Nash, 439 So. 2d 1032* [Fla. Ct. App. 1983], the court held that there must be an unconditional commitment to complete the condominium units within two years and that the remedies available to the purchaser must not be limited. Although the opinion's language was broad, it is HUD's position that the court's concern regarding limitations on remedies was confined to the right to specific performance. However, developers, especially those in Florida, should be aware of this [***26] decision and how it may be treated by higher Florida courts, as well as courts in other jurisdictions.

Id. It is thus apparent that the meaning of "obligation" is tied to the relevant state contract law.

As we have stated before, Florida provides the relevant state law for interpreting the contract at issue. Since the promulgation of the above-quoted regulations, the Florida Supreme Court [**37] has directly addressed this question and ruled that no contractual "obligation" exists unless the contract provides for the possibility of damages. *Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1101 (Fla. 1990).* A contract that provides only for the possibility of rescission or specific performance is not sufficient. Id.

> In the case at bar, section 8 of the Unit Sale Agreement provides:
>
> **Seller shall be in default hereunder if Seller fails to close the sale pursuant to Section 5 within two years after the date this Agreement becomes binding on Purchaser . . . . Purchaser's remedy against Seller for Seller's default hereunder shall be either to obtain a refund of all deposits made pursuant hereto . . . or to seek specific performance of this Agreement, at the Purchaser's election.**

[*10681 U.S.A. § 8 (emphasis added). Thus, it would appear that the express language of the contract does not allow for the possibility of damages. Neither the parties nor the District Court, however, have provided us with any guidance as to whether Florida law would read a damages remedy into such a contract. In other words, if specific performance is impossible [**38] and is the primary contractual remedy, will Florida nevertheless award damages to the injured party? Because the parties have not focused on this question, they have supplied us with no guidance, and we are reluctant to address it. Accordingly, we remand this issue to the District Court.

[***27] In addition, this exemption is not the only one available. Merrill Lynch also argues that the Land Sales Act does not apply to the instant transaction because the hotel interests are not "lots" under the Act, as investors do not have exclusive use of their units. We decline to reach this argument as it is not entirely clear just what plaintiffs were purchasing. We believe the issue

should be addressed in the first instance by the District Court upon remand.

D. Dismissal of Claims against TMC

Included in the Becherer plaintiffs' complaint were numerous claims against TMC, the financial institution responsible for approving investors for loans. The District Court dismissed all these claims, as it found they were barred by the D'Oench Duhme doctrine. See *D'oench, Duhme & Co. v. FDIC , 315 U.S. 447, 86 L. Ed. 956, 62 S. Ct. 676 (1942).* The District Court has adequately and correctly addressed [**39] all the arguments raised by the Becherer plaintiffs on appeal of this issue. Accordingly, we affirm the District Court for the reasons stated in its opinion. *Becherer, 799 F. Supp.* at 772-75.

E. Dismissal of Midwest

The Becherer plaintiffs filed their original complaint on August 21, 1989. Between that date and December 17, 1990, the parties actively pursued this litigation, taking depositions and filing numerous motions seeking both discovery and dismissal of various claims. On December 17, 1990, the District Court issued an order requiring the Becherer plaintiffs to file an amended complaint, but limited the amendment to possible breach of contract claims against the defendants. n8

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n8 The District Court later amended this order, but the amended order changed only the dates for filing.

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[***28] On February 1, 1991, the Becherer plaintiffs filed their amended complaint. This complaint, however, was not limited to breach of contract actions against the then-existing defendants. Rather, the [**40] Becherer plaintiffs added a

new party, Midwest, and raised breach of contract actions against Midwest for its part in the premature sale closing. on April 3, 1991, Midwest filed a motion to be dismissed as a misjoined party.

Due to various delays apparently connected with the proposed settlement proceedings, the District Court did not rule on this motion until August 7, 1992. On that date, as part of an omnibus opinion and order, the District Court granted Midwest's motion to dismiss, stating:

**Plaintiff class n9 added Midwest to their amended complaint in violation of FRCP 15(a); without leave of this court as required by FRCP 21; and in contravention to my January 7, 1991 Order. Furthermore, they knew as early as April, 1991 that Midwest objected to being added as a defendant, yet took no corrective action until May, 1992. At this stage of the litigation it would simply be unjust to add Midwest as a defendant. This case is nearly three years old, and the paperwork submitted thus far has surely decimated a small forest. Nothing suggests the claim against Midwest is newly discovered; indeed, an escrow closing is a normal part of any real estate transaction. Last, the claims against [**41] Midwest, if any remain viable after this Opinion, are discrete and severable.**

[*1069] *Becherer, 799 F. Supp.* at 775. The District Court dismissed the claim without prejudice.

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**n9 Again, it appears that the District Court used this phrase without ever certifying a plaintiff class on this issue. Accordingly, we read this language only to mean the Becherer plaintiffs.**

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[***29] The Becherer plaintiffs argue that this decision was in error. In support of this argument, they first contend that, under Fed. R. Civ. P. 15(a), they are allowed to amend as a matter of course as to defendants who have not yet filed a responsive pleading. According to the Becherer plaintiffs, as of February 1, 1991, Midwest had not filed a responsive pleading, so

the Becherer plaintiffs could add them without prior court permission.

This argument is specious. Midwest was not a party to the suit before the Becherer plaintiffs filed their amended complaint. If we accept this interpretation of Rule 15(a), a plaintiff could always [**42] add a new party, at any point in the litigation, without court permission.

The Becherer plaintiffs also attempt to refute the rest of the District Court's reasons by arguing that they did not unduly delay in responding to Midwest's motion to dismiss, that adding Midwest did not prejudice Midwest, and that the joinder served judicial economy. The Becherer plaintiffs argue that Midwest was present at almost all proceedings after it was joined as a party, and thus would not have been prejudiced.

We first note, as did the District Court, that the Becherer plaintiffs joined Midwest as a party without seeking prior court permission, as is required under either Rules 15(a) or 21. If they had been denied such permission, we would review the denial for an abuse of discretion. Thus, it logically follows that we use the same standard in reviewing the district judge's decision to dismiss Midwest.

We find that the District Court did not abuse its discretion. The claims against Midwest are related to, but easily divisible from, the claims against the other defendants. The District Court also explicitly found that allowing the Becherer plaintiffs to add Midwest would be prejudicial to Midwest. As [**43] the Ninth Circuit has stated, "amending a complaint to add a party poses an especially acute threat of prejudice to the entering party." *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir.* [***30] 1987). Accordingly, the major objective of courts faced with this situation should be to avoid prejudice to the party to be added. Id.

The Becherer plaintiffs argue that Midwest would not be prejudiced because its attorneys attended almost every proceeding after it was added. This is not, however, the proper inquiry. Instead, our focus should be on the degree to which Midwest took an active role in the litigation and whether its attorneys were simply observers or whether they actually invested substantial amounts of time in preparing Midwest's case. Simply acting as an observer and monitor would not have prepared Midwest to jump into complicated commercial litigation at this late stage in the proceedings. The District Court was in the best position to make this determination, and it found that Midwest would be prejudiced if it were not dismissed. The Becherer plaintiffs have presented us with no reason to conclude that this was an abuse of discretion.

[**44] VII.

Injunction Against Florida Plaintiffs

The District Court enjoined the Florida plaintiffs from pursuing further litigation or arbitration against all defendants as to issues actually decided by the District Court. The Florida and Becherer plaintiffs challenge this ruling on appeal.

While plaintiffs argue at length that the injunction was improper because putative class members cannot be bound absent notice and an opportunity to opt out, this focus fails to recognize that the District Court's ruling was premised on the concepts of res judicata and collateral estoppel, which are separate and independent of class certification. If either of those doctrines is applicable, the formalities of class certification are irrelevant.

As the District Court recognized, both res judicata and collateral estoppel can be used to bind a nonparty only if the nonparty was "in privity" with a party to the prior [***31] action. A nonparty will be considered in privity, or sufficiently close to a party in the prior suit so as to justify preclusion, in three situations:

> [*1070] First, a non-party who has succeeded to a party's interest in property is bound by any prior judgments against the party. . . . Second, [**45] a non-party who controlled the original suit will be bound by the resulting judgment . . . . Third, federal courts will bind a non-party whose interests were represented adequately by a party in the original suit.

Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84 95 (5th Cir. 1977)(citations omitted). The first situation is inapplicable here. The District Court glossed over the second scenario and focused on the third issue: adequate representation.

The doctrine of adequate representation is also known as virtual representation. This concept has been developed primarily by the Fifth Circuit. 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4457 (1981). In the words of the Fifth Circuit, the doctrine of virtual representation requires more than a showing of parallel interest or, even, a use of the same attorney in both suits . . . . The question of virtual representation is one of fact and is to be kept within "strict confines."..... "Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties [**46] who file a subsequent suit raising identical issues.

*Benson and Ford, Inc. v. Wanda Petroleum Co., 833 F.2d* 1172, 1175 *(5th Cir.* 1987) (citations omitted). A leading treatise also agrees with the need to keep the doctrine within strict confines:

> some decisions and commentaries have begun to develop a theory of nonparty preclusion that is often [***32] identified as "virtual representation." The broadest form of this theory would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interest with a nonparty. Justification for this result is found in the general theory of representation. Adoption of the theory in this form could expand nonparty preclusion far beyond current practice. If one of fifty persons injured in a bus accident should lose an action against the bus company, for example, all of the other passengers could be bound by any adverse findings. Actual use of virtual representation theory has not yet

begun to approach such expansive consequences, and it does not seem either desirable or likely that it will carry so far.

. . . .

A narrow role may remain for virtual representation, [**47] so long as adequate litigation remains the central requirement. Some cases may present substantial elements of several different grounds of nonparty preclusion, without clearly justifying application of any one ground. Careful application of the virtual representation label may provide a convenient means of aggregating these separate elements in special circumstances that make relitigation especially unattractive . . . . Close nonlitigating relationships with a party, participation, apparent acquiescence, and perhaps deliberate maneuvering to avoid the effects of the first action are among the factors to be weighed.

. . . .

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4457 (1981). A review of the case law reveals that courts will refuse to apply virtual representation simply to preclude a nonparty from relitigating issues that have been lost after vigorous advocacy by a party who seems to hold an interest identical to the interests of the nonparty. Id.

[***33] In support of its finding that the Florida plaintiffs were adequately represented by the Becherer plaintiffs, the District Court declared:

The relationship between Florida [**48] plaintiffs and the named plaintiffs is "sufficiently close" to support a finding of privity. Both are in the group of investors that purchased units in The Registry Hotel. Both have the same interest in the case, i.e., both were identically situated and both raise the same causes of action.

*Becherer v. Merrill Lynch, 809 F. Supp. 1259, 1268-69 (E.D. mich. 1992). As* these words illustrate, the District Court used an impermissibly [*1071] broad definition of adequate or "virtual" representation.

Accordingly, we must reverse the District Court's finding of privity and vacate its ensuing injunction. The briefs

submitted by the parties on appeal, however, demonstrate a strong possibility that this case may yet be an appropriate one for the application of res judicata and collateral estoppel. Merrill Lynch contends that the Florida plaintiffs, through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the Becherer plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee.

Because many of the facts discussed in the briefs are in dispute and because [**49] the issue was not fully developed and is essentially factual, we are unable to decide it here. Instead we remand the case to the District Court for factual findings under the narrower theory of virtual representation articulated above.

VIII.

Miscellaneous Issues Raised by Florida Plaintiffs

The Florida plaintiffs also complain of the procedures used by the District Court in facilitating the proposed, but [***34] rejected, settlement. As the settlement failed, no relief is necessary or available. Accordingly, these issues are moot and we decline to address them.

IX.

We AFFIRM the portion of the District Court's opinion finding that SSG breached its contract by prematurely leasing FF&E, but REVERSE the District Court's decision to pierce the corporate veil and hold Can-American Corporation, Can-American Realty Corporation, and their three shareholders secondarily liable for SSG's breach of contract regarding the premature lease of FF&E.

We REVERSE the District Court's ruling that this transaction is exempt from the requirements of the Land Sales Act

under *15 U.S.C.* § 1702(a)(2). we REMAND this issue for further proceedings consistent [**50] with this opinion.

We REVERSE the District Court's finding of adequate representation and VACATE the ensuing injunction. We REMAND this issue for factual findings under the narrower version of virtual representation articulated above. In all other respects, we AFFIRM the rulings of the District Court.

**APPENDIX B**

District Court Opinion, 809 F. Supp 1259

BECHERER v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

Case No. 89-CV-72502 Hon. John Feikens

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

809 F. Supp.. 1259; 1992 U.S. Dist. LEXIS 18343

November 24, 1992, Decided
November 24, 1992, Filed

SUBSEQUENT HISTORY: [**1] Amended Order and Injunction Reported at: *809 F. Supp. at 1276.*

JUDGES: Feikens

OPINION BY: JOHN FEIKENS

OPINION: [*1262] OPINION AND ORDER

This Opinion holds that a group of 298 investors who purchased unit interests in a 474-room resort hotel ("The Registry Hotel") in Naples, Florida (and who began a lawsuit in this court entitled "Richard C. Becherer, Lawrence Milton Richard, Robert A. Horvath and Shirley L. Horvath, and Henry V. Denolf and Joann L. Denolf, individually, and on behalf of all others similarly situated, Plaintiffs") are bound by the doctrines of res judicata and collateral estoppel to the findings of fact and conclusions of law in my Opinion of August 7, 1992, and the resulting Order and Judgment, for the following reasons:

1. All investors in The Registry Hotel, including Florida plaintiffs, are parties in this case and are represented through named plaintiffs and their counsel;

2. All parties in the several hearings held before me on the motions for summary judgment or dismissal of plaintiffs' fraud claims proceeded on the basis that my decisions would bind all investors.

3. All investors are in privity with the named plaintiffs.

A history of this case is in order. I refer to that section of the first five pages of my opinion of August 7, [**2] 1992 entitled "Background", which I restate here: "This case began with a lengthy complaint containing sixteen counts. It alleged that a group of 298 investors, who asked to be designated as a class, purchased unit interests in a 474-room resort hotel (The Registry Hotel), herein referred to as the hotel, to be located on Pelican Bay in Naples, Florida, for a total price of $ 89,225,500. Named as defendants are a group, referred to herein as the developer, Can-American Corporation, Can-American Realty Corporation, Shelter Seagate Corporation, Garrett G. Carlson, Graham C. Lount, and Arni Thorsteinson. Also named as defendants are Merrill Lynch, Pierce, Fenner & Smith, Inc.; Frank Lavin; Martin Cicco; Laventhol & Horwath, certified public accountants retained by the developer; Dominion Financial & Investment Corporation; M.A. Mortenson Company; and Winsor/Faricy Architects, Inc.

The counts captioned in the complaint are:

1. Violation of the Exchange Act, §10(B) and Rule 10b-5;

2. Violations of the Exchange Act, §20.

3. Violations of the Securities Act, §12(2);

4. Violation of the Securities Act, §15;

S. Fraudulent and negligent misrepresentation;

6. Violation [**3] of the Land Sales Act;

7. Aiding and abetting/conspiracy;

8. Violation of RICO;

violation of Florida's RICO statute;

10 Breach of fiduciary duty (against named defendants);

11. Breach of fiduciary duty (against named defendants);

12. Breach of fiduciary duty (against named defendants);

13. malpractice/negligence;

14. Respondeat superior;

15. Breach of warranty; and

16. Breach of contract.

In managing this case, I concluded that there was a strong need for the
adoption of special procedures, since the case involved complex issues, multiple parties, and difficult legal questions (Fed. R. Civ. P. 16(c)(10)).

The complaint was filed on August 21, 1989, and there followed a blizzard of motions and briefs. Between August 21, 1989 and April 23, 1990, the date on which I was able finally to

schedule a Rule 16 conference, there were ninety docket entries, comprised of discovery motions, Rule 12 and 56 motions, and supporting and response briefs.

Clearly, Rule 16 had to be vigorously applied.

A pretrial conference held on April 23, 1990 began this process. with close questioning of parties, counsel, it appeared that the complaint was bottomed on allegations [**4] [*1263] of fraud and breach of contract. Three occurrences of fraud were alleged:

1. That the Private Placement Memorandum (the "PPM"), which disclosed that the W.B. Johnson Company was interested in erecting a hotel on Pelican Day, did not say that hotel was a Ritz-Carlton;

2. That the PPM stated that the hotel was to be furnished with approximately $ 13.5 million of furniture, fixtures and equipment; and that defendants, or some of them, rather than perform that contractual undertaking, leased the furniture, fixtures and equipment placed in the hotel and thereby burdened the hotel with lease payments; and

3. That fraud surrounded the October 30, 1986 closing date, when the hotel was to be "substantially completed."

That status conference on April 23, 1990, as the record amply demonstrates, compacted the prolix allegations of fraud in the complaint to three manageable areas and, on May 15, 1990, a detailed order managing initial discovery was entered.

In motion hearings, these three occurrences were then addressed.

In an opinion and Order dated November 20, 1990, I granted a motion for summary judgment on plaintiffs, first fraud

claim. I found no fraud in the claim that the investors [**5] were not notified that another hotel to be built on Pelican Bay would be a Ritz-Carlton hotel.

On March 15, 1991, I entered an order for an expedited trial. I determined that the remaining two issues of alleged fraud could be tried as breach of contract claims against the developer Shelter Seagate, Can-American Corporation, Can-American Realty Corporation, and the individual defendants Carlson, Lount and Thorsteinson (referred to collectively as "the Shelter Seagate Group", or as "SSG", or as "the developer"). In that Order I also certified a plaintiff class. Jury trial was waived.

On the second claimed issue of fraud, reformed into a breach of contract claim, i.e., the decision by the developer defendants to lease furniture, fixtures and equipment for the hotel rather than to purchase them, resulted, following a full hearing, in a grant of partial summary judgment in favor of the plaintiff class and against the developer defendants. That ruling was made on May 7, 1991. I reserved for a future hearing a determination of the remedy for that breach." n1

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n1 That hearing was held on July 16, 1992. See my August 7, 1992 Opinion and order for my decision on this issue.

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[**6]

I held a bench trial on plaintiffs, contract claims against the SSG defendants in May 1991. After the trial on the contract claims against the SSG defendants, all parties to the lawsuit began negotiating a global settlement. At this point the parties asked me to stay closing arguments on trial issues, on the various trial motions, and on motions for dismissal and for summary judgment then pending. I had earlier granted a motion for summary

judgment on the claimed breach of contract regarding the leasing of furniture, fixtures, and equipment for the hotel and I likewise deferred taking testimony on the matter of damages caused by that breach. The 298 investors are represented by the law firms of Elwood S. Simon & Associates of Bloomfield Hills, Michigan; Garwin, Bronzaft, Gerstein & Fisher of New York City; and Spector & Roseman of Philadelphia. Settlement negotiations were protracted and, in fact, took the better part of the year 1991 and two months into 1992, when, in February, the parties reported to the court that all claims in the case, those set forth in the original Complaint and the First Amended Complaint, were settled.

> The Stipulation Of Settlement, at page 1, described [**7] the plaintiffs as:
>
> All persons and entities (the "Unit Owners") who were (i) original purchasers of hotel interests in The Registry Hotel at Pelican Bay, Naples, Florida (The "Registry Hotel") at the October 31, 1986 closing, and (ii) their direct or indirect successors or assigns who are currently Unit Owners . . . .

[*1264] I certified this class for the purposes of settlement on February 14, 1992 and that order is incorporated herein by reference and made a part hereof. (See Appendix 1). I directed that notice be sent to all parties and, notably, to the 298 investors who began this lawsuit.

Shortly thereafter, I received a letter from plaintiffs, counsel Elwood Simon. In that letter Simon informed me that an attorney, Thomas R. Grady, of Naples, Florida had contacted him and requested that he not communicate with certain of the class members who were now Grady's clients. Simon's letter included copies of letters dated March 9 and 10, 1992, from Grady, who purported to represent individuals who are class members to whom Simon had addressed papers regarding the settlement. In these letters, Grady advised class counsel that no contact was to be made with certain members of the class [**8] whom Grady

purported to represent. Class counsel requested, and I granted, an order To Show Cause why Simon and other class counsel could not contact members of the plaintiff class regarding the proposed class action settlement.

At the Show Cause Hearing held on March 19, 1992, Simon and other plaintiffs, counsel argued that they had the right to contact the members of the class because they represented these individuals in the class action lawsuit. On March 24, 1992, I entered an Order stating that class counsel were permitted, and had the duty, to continue communicating directly with their clients, including all members of the certified class, and, or, all plaintiffs or investors represented by named plaintiffs.

Despite these efforts, the global settlement was not completed. Under the terms of the settlement, the number of investors who elected to opt out of the proposed settlement was sufficient to scuttle the agreement.

The proposed settlement now dead, I scheduled oral arguments on the various matters stayed by me while settlement negotiations pended. These hearings were held in June and July of 1992, and I issued my Opinion and Order on August 7, 1992 and Judgment followed. [**9]

Sixty five investors in The Registry Hotel, represented as they are by Richard C. Becherer, Lawrence Milton Richard, Robert A. Horvath, Shirley L. Horvath, Henry V. Denolf and Joann L. Denolf, now seek to avoid the binding effect of my August 7, 1992 Opinion and Order and the resulting Judgment. This leads to:

I. Merrill Lynch's Motion for Injunction:

In September, 1992, approximately 65 of the unit owners filed suit against Merrill Lynch in Florida state court in a case entitled Adams, et al. v. Merrill Lynch Pierce, Fenner & Smith,

Inc., et al., Twentieth Judicial Circuit (Collier County, Florida), Civil Action No. 92-2776-CA-01. (These 65 unit owners are hereinafter referred to as the "Florida plaintiffs"). All the Florida plaintiffs are members of the class that I certified for the SSG contract trial. All are investors who are represented by and in privity with named plaintiffs. Importantly, all but two of the claims set forth in the Florida lawsuit were adjudicated by me in my August 7, 1992 Opinion.

Even though the 298 investors were represented at all times in this case through the named plaintiffs and through counsel hereinbefore stated, both that counsel [**10] and Thomas Grady, counsel for Florida plaintiffs, now assert that the Opinion, order and Judgment of August 7, 1992 is not binding on them except as to the adjudication of the contract claims alleged against the Shelter Seagate Corporation defendants.

> I now take up Merrill Lynch's motion to enjoin the proceedings pending against it in the Florida state court. Merrill Lynch seeks to enjoin the Florida state court proceedings because the claims raised in that case are precluded by my decision in this case through the application of res judicata and collateral estoppel principles.

I hold that my August 7, 1992 Opinion and the resulting Judgment fully resolve this case. All plaintiffs, claims as investors [*1265] were resolved in that opinion. All the investors in The Registry Hotel are in privity with the named plaintiffs and are before this court. Thus, the August 7, 1992 Opinion and order and Judgment bind all 298 investors.

As described below, Florida plaintiffs are parties in this case and are represented through named plaintiffs and their counsel. Plaintiffs, Complaint and First Amended Complaint both state that the case is brought "on behalf of a class consisting of all persons and entities [**11] who purchased Hotel Interests . . .

". First Amended Complaint at P 13. It is clear that this action was begun in this court on behalf of all investors long before Florida plaintiffs began their suit in Florida state court in September 1992.

It is also not open to question that named plaintiffs and their counsel represented all investors including Florida plaintiffs in negotiating the proposed settlement to which reference is earlier made. (See Appendix 2). Plaintiffs, counsel acted on behalf of all investors in such settlement discussions culminating in their request to me that I certify a class to approve the settlement. on February 14, 1992, I did conditionally certify a class consisting of all investors and tentatively approved the proposed settlement. (See Appendix 1, order Certifying Class For Settlement). It was because of this that plaintiffs, counsel argued before me at the March 19, 1992 Show Cause Hearing that they had the duty to communicate directly with Florida plaintiffs who are their clients.

As stated hereinbefore, when settlement failed, I decided the remaining matters before me such as the contentions of the parties regarding the breach of contract claim and [**12] motions for summary judgment on, or dismissal of, plaintiffs, fraud claims. n2 At no point did plaintiffs, counsel claim that the rulings to be made by me on those matters would only bind the named plaintiffs. All parties in the several hearings proceeded on the basis that my decisions would bind all investors. Now surprisingly plaintiffs, counsel argue that my decision binds only the named plaintiffs.

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n2 These motions included: Merrill Lynch's Motions To Dismiss Complaints, Frank Lavin's Motion To Dismiss Complaints, Martin Cicco's Motion To Dismiss Complaints, SSG Defendants' Motion For Summary Judgment on Fraud Claims, SSG's Motion To Dismiss Interstate Land Sales Act Claims, Trustbank's Motion For Summary Judgment, Mortenson's Motion For Stay Pending and Directing Arbitration, Winsor/Faricy's Motion For Stay Pending and Directing Arbitration, Midwest Title's Motion To Be

Dropped As Misjoined Party, Plaintiffs, Motion To Join Midwest Title As Defendant, Plaintiffs' Cross-Motion For Summary Judgment As To First Amended Complaint.

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[**13]

This is especially significant since plaintiffs, counsel knew before these issues were argued that.Thomas Grady also claimed to represent 65 of these investors. I note, too, that plaintiffs' counsel, Elwood Simon, and Florida plaintiffs' counsel, Thomas Grady, are co-counsel in 18 foreclosure cases brought by the Resolution Trust Corporation ("RTC") n3 against Florida plaintiffs in the Florida state court.

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n3 The Office of Thrift Supervision ordered the receivership of Trustbank Federal Savings Bank and appointed RTC as Receiver. The assets of Trustbank that succeeded to the RTC as Receiver included approximately 356 loans that were made to investors to finance the purchase of the hotel units in The Registry Hotel. RTC, as Receiver for Trustbank, currently holds those loans. Those loans are evidenced by mortgage notes executed by unit owners and are secured by first mortgages on the respective hotel units in The Registry Hotel. Affidavit of Jacob J. Huber, Field Site manager for RTC as Receiver for Trustbank, filed on July 15, 1992.

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[**14]

It is clear from the record that plaintiffs, counsel proceeded to argue these issues on behalf of all the investors, including Florida plaintiffs.

Counsel for Florida plaintiffs, Thomas Grady, also is aware that all investors are bound by my decision on these matters. At a client meeting held on March 4, 1992, Grady warned Florida plaintiffs that they may be "stuck" n4 with my decision in this

[*1266] case because of res judicata and collateral estoppel principles. Plaintiffs, Supplemental Motion For Sanctions, Exhibit C, Transcript of March 4, 1992 Client Meeting, p. 43-44.

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n4 Grady stated at the client meeting held on March 4, 1992 that: The law is simply not clear on what's called collateral estoppel and res judicata and issue preclusion. Basically, where an issue has been litigated once before, when does it bind a party and what parties does it bind? I can't answer it because I don't know what the ruling is and I don't know against whom the judge will say it belongs, but there is a risk that there will be some ruling there and it may be adverse and you may be stuck with it. It may also be favorable and they may be stuck with it, so they've got the same uncertainty facing them. I think that's the best that I can do with you in answering that.

Transcript of Thomas A. Grady, P.A. March 4, 1992 Client Meeting, p.44.

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[**15]

An additional point: When in March, 1991, I certified a class as to the contract claims against the SSG defendants, plaintiffs, motion to certify a class on the fraud and remaining claims was not denied by me. In hearings resolving these issues in June and July of 1992, no party raised the need to again certify a class.

I turn now to the law governing the issues raised by Merrill Lynch's motion to enjoin the Florida proceedings.

A. Res Judicata and Collateral Estoppel

The doctrines of res judicata and collateral estoppel preclude parties from relitigating claims and issues which have previously been decided. In *Gargallo v. Merrill Lynch, 918 F.2d 658 (6th Cir. 1990)*, the U.S. Court of Appeals for the Sixth

Circuit distinguished the doctrines of res judicata and collateral estoppel:

> Res Judicata and collateral estoppel are not the same. Res Judicata, or claim preclusion as it is more helpfully termed, is the doctrine, simply stated, by which a final judgment on the merits in an action precludes a party from bringing a subsequent lawsuit on the same claim or cause of action . . . .
>
> Collateral estoppel, or issue preclusion as it is better [**16] termed, precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim of cause of action.

Id. *at 660-61.* See also *Overseas Motors, Inc. v. Import Motors Limited, 375 F. Supp. 499 (E.D. Mich. 1974),* aff'd., *519 F.2d 119 (6th Cir. 1975),* cert. denied, *423 U.S. 987, 46 L. Ed. 2d 304, 96 S. Ct. 395 (1975)* (where I discussed the distinction between res judicata and collateral estoppel and the requirements for collateral estoppel). Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the that action. *Migra v. Warren City School District Board of Education, 465 U.S.* 75, 79 L. *Ed. 2d 56, 104 S. Ct. 892 (1984).*

Res judicata and collateral estoppel principles bar the relitigation of a claim or an issue decided in a prior case, where the party against whom the bar is used was a party, or in privily with a party, in the prior action. See *Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982)* [**17] ("A person against whom the conclusive effect of a judgment is invoked must be a party or a privy to the prior judgment"); Estoppel by Judgment, *31 A.L.R.3d 1044* at *1067* ("The doctrine of collateral estoppel can be invoked by a stranger to the judgment only against one who was a party, or in privily with a party, to the

judgment and had a full opportunity to litigate the relevant issue"); 113 Moore's Federal Practice P 0.411(l](1965) ("At colon law this preclusive effect extended to those in privity with the parties").

Courts are not bound by rigid definitions of the parties or their privies for purposes of applying res judicata and collateral estoppel. *Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979),* cert. den. *445 U.S. 952, 63 L. Ed. 2d* 787, *100 S. Ct. 1601 (1980). In Jackson, supra,* the U.S. Court of Appeals for the Ninth Circuit held that members of an alleged class were bound by a judgment in a suit that was brought as a class action and "treated" as such even though a class had never been certified. Id. *at 1126.* In the first suit, a declaratory judgment action [**18] was filed on behalf of all persons arrested at a college rally in 1969. A three-judge federal court panel rejected the plaintiffs, challenge to the constitutionality of the arrests. The plaintiffs brought this suit on behalf of themselves and all [*1267] others similarly situated. Although a class was never certified, the parties and the court treated the suit as a class action.

Subsequently, a second suit was brought by several of the persons arrested to challenge the constitutionality of the mass arrest. The defendants moved for summary judgment asserting that the claim was barred by res judicata. The plaintiffs argued that res judicata did not bar the second suit because a class was never certified in the first case and thus the cases involved different parties. The U.S. Court of Appeals for the Ninth Circuit disagreed, stating that:

Carrillo [the first suit] was brought on behalf of all those who were arrested January 23 at the College. It was brought as a class action and treated by the court as a class action. Virtually all of those arrested were represented by counsel in the Carrillo case.

Id. at *1126.* The court further noted that:

Since [**19] Carrillo [the first suit] was never certified as a class action, plaintiffs argue that it should not be considered in that light. In view of the considerations set forth in the text, we believe that this would elevate form over substance, which we decline to do in this case.

*Id. at 1126 n.7.*

In this case the Florida plaintiffs are parties and are adequately represented by the named plaintiffs and their counsel. As in Jackson v. Hayakawa, both the Complaint and the First Amended Complaint in this case indicate that the suit is brought on behalf of all the investors in The Registry Hotel. Additionally, the proposed settlement sought to resolve all claims as to all investors. The settlement was not limited to the plaintiffs, contract claims against the SSG defendants or to the named plaintiffs.

Similarly, plaintiffs, counsel proceeded in a manner consistent with the fact that they represented all investors. Plaintiffs, counsel strenuously argued before me at the March 19, 1992 Show Cause Hearing that they were permitted, and had the duty, to communicate directly with all investors because they represent them in this litigation. (See Appendix (**20] 3, Order Dated March 24, 1992). Interestingly, after I issued my August 7, 1992 Opinion and Order, Merrill Lynch contacted investors and attempted to negotiate another settlement. After the Florida proceeding was started, plaintiffs, counsel filed an emergency motion arguing that I should enjoin Merrill Lynch's unauthorized solicitation of settlement with investors, including Florida plaintiffs, because the investors are represented by them. Plaintiffs' Memorandum Of Law In Support Of Their Motion To Enjoin Merrill Lynch's Unilateral Solicitation Of settlements with Investors, p.3-4.

B. Privity

I turn now to this principle since it is an important aspect of the res judicata doctrine.

The term privity defines a legal conclusion that the relationship between a party and a nonparty is sufficiently close to mandate the application of the doctrine of res judicata. EEOC *v. U.S. Steel Corp., 921 F.2d 489, 493 (3rd Cir.* 1990). Southwest *Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84, 95 n.38 (5th Cir.* 1977) ("Privity . . . represents a legal conclusion that the relationship between [the parties] [**21] is sufficiently close to [support] preclusion"). The doctrine of privity is to be applied with flexibility. *United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980).*

Federal courts have defined several types of relationships as "sufficiently close" to justify preclusion. The relationship between a party and a nonparty is sufficiently close to justify preclusion when the nonparty has succeeded to the party's interest in property. *Golden State Bottling Co. v. NLRB, 414 U.S. 168, 38 L. Ed. 2d 388, 94 S. Ct. 414* (1973). Similarly, privity exists when a nonparty controls the original suit. Dudley *v. Smith, 504 F.2d 979 (5th Cir.* 1974). Privity also exists when the interests of a nonparty are adequately represented by a party in the initial action. *Ellentuck v. Klein, 570 F.2d 414, 425 (2d Cir. 1978).*

[*1268] In the recent case of *Sanders Confectionery, et al. v. Heller Financial, et al., 973 F.2d 474 (1992),* the U.S. Court of Appeals for the Sixth Circuit discussed the concept of privity. The court stated that:

Res judicata also bars those [**22] in privity with parties from bringing suit later. Privity in this sense means a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented..

Opinion at 8, 9 (emphasis added).

In discussing when a "party's interests are adequately represented", the court in Sanders referred to Amalgamated Sugar *Co. v. NL Industries, Inc., 825 F.2d 634 (2d Cir. 1987)*, cert. den. 484 *U.S. 992, 98 L. Ed. 2d 511, 108 S. Cc. 511 (1987).* In Amalgamated Sugar, the court held that the interests of a party are adequately represented when the party does not have a different interest in the case. In Amalgamated Sugar, an acquiring corporation filed suit against the target corporation challenging the validity of the target's poison pill stock purchase plan. The court entered a consent judgment which was converted into a final judgment permanently enjoining the implementation of the stock purchase plan. Subsequently, a shareholder brought suit to establish the validity of the stock purchase plan. The court held that the corporation adequately represented the shareholder in the prior suit because the [**23] shareholder did not have a different interest in the claim. That is, both parties asserted the same cause of action -- defending the validity of the stock purchase plan. Id. at *641.* Thus, the court held that the shareholder was in privity with the corporation and his or her subsequent suit was barred by res judicata. See also *Index Fund, Inc. v. Hagopian, 677 F. Supp. 710 (S.D.N.Y. 1987)* (The court held that a congruence of interests between a corporation president and the corporation's insurer in resisting a claim of fraud was sufficient to mandate a finding of privity).

In Sanders, the U.S. Court of Appeals for the Sixth Circuit adopted the Amalgamated Sugar test to determine when a party's interests are adequately represented so as to be in privity with another party. The court held that when the parties have the same interest in the case, the nonparty is adequately represented. In Sanders, the court held that the shareholder did have an interest in the case different from the corporation. In that ease, the corporation filed a petition in bankruptcy court. The end result of the bankruptcy action was a bankruptcy [**24] plan confirmed in an order of the court constituting a final judgment. The bankruptcy plan released the lender Keller from any lawsuits arising from the financing of the corporation. The corporation

later filed a lender liability suit against Keller. A shareholder also brought a suit alleging that Keller had violated securities law disclosure requirements with respect to the sale of securities. The Court of Appeals for the Sixth Circuit held that the suit by the corporation was barred by res judicata because the bankruptcy court judgment bound the corporation. Keller argued that the shareholder's suit was also barred because the shareholder was in privity with the corporation. The Sixth Circuit held that the corporation could not adequately represent the shareholder because only a shareholder could raise the securities law disclosure claim. Thus, the court held that the shareholder was not in privity with the corporation and his suit was not barred by res judicata. n5

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n5 See also *Saginaw v. Consumers Power Co., 304 Mich. 491, 8 N.W.2d 149* (1943) ("The intervening plaintiffs, while not actually present in the former suit, were parties by representation and are bound by the judgment."); McIntosh *v. City of Pittsburg, 112 Fed. 705 (Cir. Ct. W.D.Pa. 1901)* (The court held that nonparties could be held bound to the results of a prior suit if their interests were identical to the party's interest in the prior suit.)

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[**25]

Under the Sanders and Amalgamated Sugar tests, Florida plaintiffs are also in privity with the named plaintiffs in Becherer. The relationship between Florida plaintiffs and the named plaintiffs is "sufficiently close" to support a finding of privity. Both are in the group of investors that purchased units in The Registry Hotel. Both have the same interest in the case, [*1269] i.e., both were identically situated and both raise the same causes of action. Florida plaintiffs' interest in The Registry Hotel and the underlying litigation is identical to the named plaintiffs' interest. I held that when I certified a class that included the Florida plaintiffs for the contract claims against the SSG defendants. The alleged fraud

claims against Merrill Lynch are no different. All investors purchased their hotel units in the same time period and relied on the same Private Placement Memorandum in doing so. Florida plaintiffs are therefore identically situated to the named plaintiffs in this case with respect to the fraud claims against Merrill Lynch and the named plaintiffs and their counsel adequately represented the Florida plaintiffs in Becherer. n6 Plaintiffs, counsel argued that [**26] in a brief in which they stated that they adequately represented Florida plaintiffs, interests. Plaintiffs, Memorandum of Law In Opposition To Motion To Intervene, p.3. This, coupled with the fact that Florida plaintiffs' interest in the claims against Merrill Lynch is identical to that of the named plaintiffs in this case, aptly demonstrates that Florida plaintiffs are adequately represented. Under the test enunciated in *Sanders Confectionery, supra,* Florida plaintiffs are in privity with the plaintiffs in this case. Florida plaintiffs' state court proceeding is therefore barred as to the claims already litigated in Becherer.

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n6 Merrill Lynch also argues that the involvement of the Association of Unit owners ("AUO") in this suit supports a finding of privity. Merrill Lynch alleges that the Florida plaintiffs are members of AUO. They claim that because AUO organized, financed, and control led the Becherer litigation, the Florida plaintiffs are bound by the result of the case. In support of this contention Merrill Lynch cites *General Foods Corp. v. Massachusetts Dept. of Public* Health, *649 F.2d* 784 *(1st* Cir. 1981). Because of the holding that I make here, this issue need not be reached.

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C. Collateral Estoppel:

Even though Florida plaintiffs, claims are barred by the doctrine of res judicata for the reasons stated herein, they are also barred by the principle of collateral estoppel. The doctrine of collateral estoppel precludes Florida plaintiffs from relitigating

issues of fact or law actually litigated and decided by me in this case. I have decided investors' claims against Merrill Lynch and the other defendants in this case; Florida plaintiffs cannot now attempt to litigate those issues again. n7

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n7 But See Section II.C. of this Opinion and Order.

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My holding in this Opinion and order that Florida plaintiffs are parties in this case and are in privity with the named plaintiffs and are also collaterally estopped extends to all investors in The Registry Hotel. The doctrine of res judicata bars all investors from relitigating claims that have already been decided in this case. Res judicata principles also preclude relitigation of investor claims against other Becherer defendants, [**28] not just Merrill Lynch.

II. Florida Plaintiffs' Response To Merrill Lynch Motion:

I turn now to arguments made by Florida plaintiffs in response to Merrill Lynch's motion for an injunction.

A. Jurisdiction To Decide Motion For Injunction:

Florida plaintiffs, in opposing the Merrill Lynch Notion to enjoin the state court proceeding, also argue that once a notice of appeal was filed, I am without jurisdiction to consider the res judicata effect of its judgment or to otherwise rule on a request to enjoin state action. On September 11, 1992, Florida plaintiffs filed a notice of appeal from my August 7, 1992 Opinion and order and the resulting Judgment. n8 Plaintiff class also filed a notice of appeal on September 17, 1992.

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n8 The apparent anomaly between Florida plaintiffs filing a motion to intervene in this case and their simultaneous filing of a Notice of Appeal of this court's August 7, 1992 opinion is explained in one of their briefs. Counsel for Florida plaintiffs states that "while acknowledging that intervention by a nonparty is generally the better practice, the Florida [plaintiffs] also have standing to appeal the judgment in Merrill Lynch's favor even absent intervention". Florida Action Intervenors' Reply To Merrill Lynch's Supplemental Brief Regarding Jurisdiction, p.3.

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[*1270] In American Town Center v. Hall 83 Associates, 912 F.2d 104 (6th Cir. 1990), the U.S. Court of Appeals for the Sixth Circuit laid out the framework for determining when a district court has jurisdiction to decide motions presented to it after an appeal is filed. The court stated:

The standard for jurisdiction after the filing of the notice of appeal enunciated in Cincinnati Bronze is that a district court may enforce its judgments but not expand upon it. In contrast to the cancellation of lis pendens, which was simply an enforcement of the judgment, enjoining state litigation entails a much greater involvement by the district court. Specifically, to issue an injunction, the district court would have to rule on the res judicata effect of its judgment, thus requiring a comparison between the state complaint and the federal action. Since there are different parties and additional claims in the state court action, the district court would be expanding upon its opinion rather than simply enforcing its judgment, the key distinction of Cincinnati Bronze. Thus, we conclude that the district court was without jurisdiction to enter an injunction.

Id. at 110-111.

The parties [**30] in the Florida action are no different from the parties before fn. As the court held in Cincinnati Bronze,

supra., by issuing an injunction against the relitigation of claims I have already decided, I would be enforcing my Judgment, not expanding upon it. Thus, I conclude that I have jurisdiction to enjoin the Florida state court proceeding even though an appeal has been filed. n9

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n9 Merrill Lynch makes a second argument. It argues that because a post-judgment motion was pending, the notice of appeal is void pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure and the court retains jurisdiction to hear the motion for an injunction. This issue is not addressed in this opinion because of my holding that this court still has jurisdiction to enforce its judgments.

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B. Personal Jurisdiction over Florida Plaintiffs:

Florida plaintiffs also argue that this court does not have personal jurisdiction over them because no class was ever certified for purposes of the Merrill Lynch fraud claims. [**31] Counsel for Florida plaintiffs has filed affidavits from most of those plaintiffs stating that "With the single limited exception of the Shelter Seagate contract claim, I have never submitted to the jurisdiction or venue of this court . . . ". Florida Action Intervenors' Supplemental Memorandum, Exhibits 1 through 39.

Counsel for Florida plaintiffs confuses the concept of personal jurisdiction with the res judicata issue. I have personal jurisdiction over the Florida plaintiffs because they are parties to the case before me through their representatives. They also are members of the class in the breach of contract trial which I conducted, and as such are bound by the results of that trial. For these reasons, I conclude that there is personal jurisdiction over them. As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $ 6.7 million judgment from SSG, n10 of

which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

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n10 Florida plaintiffs are members of the class that I certified for purposes of the expedited trial on plaintiffs, contract claims against the SSG defendants. On May 7, 1991, following a full hearing, I granted partial summary judgment in favor of the plaintiffs on the breach of the furniture, fixtures, and equipment ("FFE") contract. Appendix D of the August 7, 1992 Opinion contains a transcript stating the reasons and grounds for that grant of partial summary judgment. A hearing was held on July 16, 1992 in order to determine the amount of damages that plaintiffs were entitled to as a result of that breach. Section VIII of the August 7, 1992 Opinion contains my holding that plaintiffs are entitled to damages for the breach of the FFE contract in the amount of $ 6,733,224.56.

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C. Res Judicata Effect of This Case on the Florida Proceeding:

Florida plaintiffs also assert that the res judicata and privity issues can be raised by Merrill Lynch in the Florida state court proceeding, and thus there is no need for an injunction. However, the fact that Merrill Synch has the option of raising these issues as a defense in the Florida state court proceeding does not preclude them from raising the issue before me. I agree with the court in *Bechtel Petroleum, Inc. v. Webster, 796 F.2d 252, 253 n.2 (9th Cir. 1986),* which noted that the district Judge who presided over earlier litigation is in the best position to assess the res judicata claim.

I have the power to enjoin the Florida action under the relitigation exception to the Federal Anti-Injunction Act, *28 U.S.C. § 2283*, which allows federal courts to enjoin state court proceedings when necessary "to protect or effectuate its judgments".

Florida plaintiffs cite the U.S. Supreme Court case of *Chick Kam Choo v. Exxon Corp., 486 U.S. 140,* 147, 100 *L. Ed. 2d* 127, *108 S. Ct. 1684 (1988),* for the proposition that I cannot enjoin claims or issues that were [**33] not presented and decided in Becherer. Prior to the U.S. Supreme Court decision in Chick Kam Choo, a federal court had the power to enjoin state court proceedings to the full extent that they were precluded under the doctrine of res judicata. That is, a federal court could enjoin not only the claims that were raised in the initial suit, but also claims that could have been raised in that suit. See 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4226 (1988 & Supp. 1990), p. 544-45 (citing cases where federal courts properly enjoined state court proceedings on parts of claims that could have, but were not, raised in federal action); *Musselman v. Guttman Institute, 674 F. Supp.* 1038, 1039 (S.D.N.Y. 1987). However, the U.S. Supreme Court's decision in Chick Kam Choo called this into question.

In Chick Kam Choo, the U.S. Supreme Court held that a federal district court did not have the power under the relitigation exception to the Anti-Injunction Act to enjoin a claim that was not decided by the court. The Court stated that:

The relitigation exception was designed to permit a federal court to prevent state [**34] litigation of an issue that previously was presented to and decided by the federal court . . . . An essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court.

Id. at 147-48.

The Court stated that the requirement that an issue be previously presented and decided before it could be enjoined under the relitigation exception is "strict and narrow". Id. at 148.

At least one court has held that, based on Chick Kam Choo, a federal court cannot enjoin issues that it has not actually decided. In *Staffer v. Bouchard Transp. Co., 878 F.2d 638 (2d Cir. 1989)*, the court stated that:

The language and facts of Chick Kam Choo make clear that the part of the relitigation exception to the Anti-Injunction Act that is based on concerns of res judicata is more narrowly tailored than the doctrine of res judicata. The relitigation exception does not protect the full res judicata effect of a federal court's judgment; rather, it protects only matters that actually have been decided by a federal court. [**35] . . . Undoubtedly, res judicata can bar claims that might and should have been raised but were not . . . . but, for Anti-Injunction purposes, only "relitigation" can be enjoined.

Id. at *643*. See also American Town Center v. Hall 83 Associates, 912 F.2d 104, 112 n.2 (6th Cir. 1990) (The court recognized that Chick Kam Choo precluded a federal court from enjoining issues that were not decided by the court. The court found that an alternative basis for affirming the district court's denial of an injunction existed because the state complaint raised two issues that the district court had not decided). However, the U.S. Court of Appeals [*1272] for the Second Circuit in Staffer also noted that while a federal court did not have power to enjoin issues which were not presented to and decided by it, it still would be proper for the state court to preclude the new claims based on the doctrine of res judicata. *Id. at 641.*

I now compare the Florida plaintiffs' Florida state court First Amended Complaint with the claims that were litigated before me.

In the Florida First Amended Complaint, the only issues raised which were not involved [**36] in my case are Counts 1 and 5. Count 1 raises the issue of whether the hotel units are exempt from registration requirements under Florida Law. Count 5 alleges that the Merrill Lynch brokers recommended and sold a high-risk security to individuals when they knew this type of investment was not suited for them.

Florida plaintiffs also argue in their brief that the Florida securities law claim (Count 4) was not decided by me. They state that Florida Securities law has a slightly different requirement than the federal securities law different elements and burdens of proof (i.e., Florida law does not require scienter on the part of the defendant). This argument is unavailing since I held in my case that there were no misrepresentations in the sale of the securities. The dismissal of the fraud claims did not involve scienter. The August 7, 1992 opinion did dispose of this fraud issue.

Similarly, the Florida plaintiffs assert that Counts 3 and 10, the Florida Condominium Act claims, were not addressed in my case. Count 10 citing the Florida Condominium Act is based on the allegation that funds for the purchase of the hotel units were released from escrow prior to the completion [**37] of the hotel. This was addressed at length in the August 7, 1992 Opinion. Additionally, Count 3 citing the Florida Condominium Act is based on the allegation of misrepresentation in the sale of securities, claims that I also disposed of in that opinion.

The only claims that the Florida plaintiffs raise in their Florida First Amended Complaint which were not addressed by me are Counts 1 and 5. Under Chick Kam Choo and Staffer, I do not have the power to enjoin these claims under the relitigation exception even though they are precluded by res judicata. It

would, however, be proper for the Florida state court to enjoin Counts 1 and 5 based on this doctrine. The remaining claims were litigated in this case and should be enjoined. Merrill Lynch's motion for an injunction against Florida plaintiffs, state court proceedings is therefore GRANTED as described herein. An Order so providing should be presented forthwith by Merrill Lynch.

III. Florida Plaintiffs, Motion To Intervene:

Florida plaintiffs have filed a motion to intervene in this case. Fed. R. Civ. P. 24 provides in relevant part:

Upon timely application anyone shall be permitted to intervene in an action: [**38] . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

See also *Triax Co. v. TRW, Inc., 724 F.2d 1224 (6th Cir. 1984).*

Florida plaintiffs claim that they need to intervene in this case for two reasons. First, they allege that they need to intervene in order to appeal my August 7, 1992 opinion which dismissed the plaintiff class, fraud claims against Merrill Lynch n11 and they repeat again that no class was ever certified for the fraud claims and thus the opinion should only dismiss the named plaintiffs, fraud claims. Plaintiffs, counsel [*1273] have also filed a Notice of Appeal dated September 17, 1992. In that notice, plaintiffs' counsel appeal that aspect of the August 7, 1992 Opinion and Order and resulting Judgment. I conclude that Florida plaintiffs' interest is adequately represented by the plaintiffs' counsel. n12

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n11 Strangely enough, the Florida plaintiffs already filed a notice of appeal in this case on September 11, 1992. That notice appeals this court's August 7, 1992 Opinion and Judgments to the extent that they bind the Florida plaintiffs to this court's decision on the fraud claims for which a class was not certified. [**39]

12 Florida plaintiffs state that they already have standing to appeal this court's August 7, 1992 Opinion regarding the Merrill Lynch fraud claims. They base this argument on the case of *Thompson v. Freeman, 648 F.2d 1144 (8th Cir.* 1981). However, Florida plaintiffs' counsel states that he filed a motion to intervene because intervention by a nonparty is generally a better practice.

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Florida plaintiffs also argue that they need to intervene in this case to contest on appeal this court's exercise of personal jurisdiction over them. They contend that appeal by them has not become moot by the appeal filed by plaintiffs' counsel. They claim that plaintiffs, counsel have no interest in challenging this court's apparent exercise of personal jurisdiction over them on the fraud claims. Because Florida plaintiffs are unquestionable parties to this case, they already have standing to appeal this court's exercise of personal jurisdiction even though that appeal is frivolous. *Thompson v. Freeman, 648 F.2d 1144 (8th Cir. 1981).* Thus, Florida plaintiffs, [**40] (or Florida Action Intervenors) Motion to Intervene is DENIED.

IV. SSG Defendants' Motion for an Order Amending this Court's Findings of Fact and Conclusions of Law:

SSG Defendants move this court, pursuant to Fed. R. Civ. P. 52(b) and 59, to issue an order amending the Court's Findings of Fact and Conclusions of Law found in the August 7, 1992 Opinion. Specifically, SSG defendants contend that:

1. The court's award of $ 1,290,930.47 in damages for lost interest income constitutes a double recovery of interest;

2. The court's failure to exclude the portion of the Northern Telecom lease that is attributed to the lease of telephones was incorrect;

3. The court's failure to conclude that SSG was entitled to restitution of $2,585,771 for improvements it made to the hotel was incorrect;

4. The court's conclusion that Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Arni Thorsteinson, and Graham C. Lount are secondarily liable for SSG's breach of the FFE lease contract are not based upon Findings of Fact.

Below is a discussion of each of these contentions.

1. Double Recovery of Interest:

SSG Defendants contend that awarding [**41] damages for the amount of the lease parents and damages for lost interest income gives plaintiffs a double recovery of interest. In my August 7, 1992 Opinion, I held that because plaintiffs made monthly lease payments, they lost the use of the money they used to make those lease payments and therefore they are entitled to lost interest income. SSG argues that interest is built into the amount of the lease payments and thus the plaintiffs are already getting back interest in the guise of the lease payments. According to SSG, the award of lost interest income constitutes a double recovery of interest.

SSG's argument overlooks the reality of the transaction. SSG,s breach of the FFE lease caused the plaintiffs to incur substantial lease payments that they otherwise would not have incurred. The portion of the lease payments which constituted

interest is a cost of leasing the furniture, fixtures, and equipment. As such, plaintiffs are entitled to this recovery. I also awarded plaintiffs lost interest income for the amount of interest that would have been earned had no lease payments been rehired and the monies been invested instead. Plaintiffs are likewise entitled to this amount. Thus, [**42] damages for the amount of the lease payments and lost interest income thereon does not give plaintiffs a double recovery of interest.

[*1274] 2. Northern Telecom Lease:

The August 7, 1992 Opinion awarded plaintiffs damages for the full amount of the Northern Telecom lease. SSG argues that the portion of the lease that was for the lease of telephones in individual hotel units should be excluded from plaintiffs' damage award. SSG states that the Private Placement Memorandum provided that SSG was allowed to lease telephones for each individual room. The amount of the lease for telephones for each unit was not excluded from the amount of the total Northern Telecom lease because plaintiffs, expert, Stanley Blumin, testified that the amount was negligible or insignificant. Now, SSG provides the affidavit of Charles M. Morris who states the portion of the Northern Telecom lease attributed to the lease of the telephones for individual hotel units was $ 310,500 n13 SSG contends that this amount should be excluded form plaintiffs, damage award.

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n13 In his affidavit, Mr. Morris asserts that the damage award should be reduced by $310,500, which equals the cost of leasing 1,027 telephones for the hotel for six years.

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The information provided in Morris, affidavit was not offered at the damages hearing held on July 16, 1992. Plaintiffs offered the testimony of their expert Blumin, who testified that the amount of the lease of telephones for individual units was insignificant and thus should not be excluded from the damage amount. SSG did not offer the testimony of Morris to contradict Blumin's conclusion. To permit this now would not allow plaintiffs to have an opportunity to cross examine Morris. Thus, I cannot consider the affidavit of Morris. At the October 16, 1992 hearing, I offered SSG defendants the opportunity to file a motion to reopen the case on this issue and they declined. Plaintiffs are therefore entitled to recover the full amount of the Northern Telecom lease as held in my previous opinion.

3. Restitution for improvements:

SSG argues that it made extra contributions to the hotel under the mistaken belief that it had the right to lease FFE in order to pay for the additions. These extra contributions include the addition of the Presidential suite, extra tennis courts, and other additions to the physical structure. SSG contends that it is entitled to restitution of $ 2,522,771 [**44] for these additions.

SSG's position on restitution was briefed and argued at the July 16, 1992 damages hearing. I disposed of that argument at page 42 of my August 7, 1992 opinion. An order denying the motion with respect to these three contentions is entered herewith.

4. Secondary Liability:

SSG defendants assert that my conclusion that Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Arni Thorsteinson, and Graham C. Lount improperly held themselves out to investors as the developer of The Registry Hotel is not supported by specific findings of fact. SSG alleges that the court failed to comply with Fed. R. Civ. P. 52 which

requires the court to find the facts specifically and state separately its conclusions of law.

In order to meet that objection, I herein make specific Findings of Fact from the trial which are being set forth in an amendment to my August 7, 1992 Opinion and order. This amendment will be issued separately from this Opinion and Order, but for clarity, it is also made a part hereof.

V. Plaintiffs' Motion for Reconsideration of August 7, 1992 Opinion Granting Trustbank's motion for Summary Judgment:

Plaintiffs [**45] move, pursuant to Local Rule 7.1(h), for reconsideration of the August 7, 1992 opinion granting defendant Trustbank's Motion for Summary Judgment. Local Rule 7.1(h)(3) provides:

Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the [*1275] case must result from a correction thereof.

Plaintiffs contend that the August 7, 1992 Opinion is defective because of the court's failure to consider the additional evidence derived from the limited discovery granted with respect to Trustbank's motion.

On June 25, 1992, oral arguments were held on Trustbank's Motion for Summary Judgment. At that hearing, I granted plaintiffs permission to conduct limited discovery on the issue of the applicability of the D'Oench Duhme doctrine. Plaintiffs submitted their Second Set of Interrogatories and Document Requests to Trustbank on July 15, 1992. At a hearing

on July 16, [**46] 1992, I granted Trustbank two weeks to respond to the limited discovery request and plaintiffs one week after that to respond. Pursuant to that schedule, Trustbank's discovery responses were due July 30, 1992 and plaintiffs, response was due on August 6, 1992. However, plaintiffs state that Trustbank's counsel obtained an extension until August 3, 1992. As a consequence, plaintiffs did not intend to file their response until August 10, 1992. I issued my opinion and Order on August 7, 1992, before plaintiffs filed their response to the discovered material. Plaintiffs argue that my failure to consider the additional evidence rendered the August 7, 1992 opinion granting Trustbank's motion for summary judgment defective.

The problem with plaintiffs, argument is that Trustbank's discovery response was filed with the court on August 5, 1992. Thus, I did have the evidence before me when I decided Trustbank's motion for summary judgment. Additionally, the evidence produced as a result of the limited discovery did not produce any new information that plaintiffs, counsel did not have beforehand. The evidence produced in the limited discovery request does not change the outcome of that motion. [**47] Thus, plaintiffs, Motion for Reconsideration of the August 7, 1992 Opinion Granting Defendant Trustbank's Motion for summary judgment is DENIED and an order so providing is entered herewith.

VI. Plaintiffs, Motion for Leave to Register Judgments In Other Districts:

Plaintiffs move for an order allowing the Final Judgment entered on August 27, 1992 against the SSG defendants to be registered with the U.S. district courts for Florida and Minnesota. Plaintiffs contend that they have been unable to locate any assets of the SSG defendants in the State of Michigan. They do assert that these defendants have assets in Florida and Minnesota.

Pursuant to *28 U.S.C. § 1963*, a judgment entered by a district court may be registered in any other district when (a) the judgment has become final by appeal, (b) upon expiration of the time for appeal, or (c) when ordered by the court that entered the judgment for good cause shown. Plaintiffs argue that good cause exists here. A showing that a defendant has property in another district and insufficient property in the district rendering the judgment to satisfy the judgment is sufficient reason for permitting [**48] the registration of the judgment in other districts. See Siegel, Commentary to 1988 Revision, 28 U.S.C. 1963 (West Supp. 1989).

At the hearing on October 15, 1992, I allowed SSG defendants one additional week to submit a brief in opposition to plaintiffs, motion to register the judgment in Florida and Minnesota. SSG defendants declined to submit such a brief. Plaintiffs have shown good cause exists to allow them to register the August 27, 1992 Judgment in other districts. Plaintiffs, motion is therefore GRANTED and an order so providing is entered herewith.

VII. Merrill Lynch's Motion to Stay Arbitration Proceedings:

On October 8, 1992, Merrill Lynch filed a motion to stay arbitration of the securities claims in the Florida state court proceeding. Because I grant Merrill Lynch's motion for an injunction against the Florida plaintiffs, state court proceeding, and for the same reasons, the NASD n14 arbitration proceeding is also enjoined. An order so [*1276] providing should be presented forthwith by Merrill Lynch. I

---------- Footnotes ----------

n14 National Association of Securities Dealers

----------End Footnotes----------

[**49]

VIII. M.A. Mortenson's Motion For Clarification:

Defendant M.A. Mortenson moves this court pursuant to Fed. R. Civ. P. 59(e) and Local Rule 7.1(h) for clarification of my August 7, 1992 Opinion. Mortenson seeks clarification as to whether the court's decision to dismiss certain of plaintiffs, claims requires dismissal of identical claims against it. Specifically, Mortensen asserts that my decision to dismiss plaintiffs, securities fraud, Land Sales Act, and joint venture claims against Merrill Lynch and Trustbank requires dismissal of these claims against Mortenson.

In my August 7, 1992 Opinion, I held that plaintiffs, claims against Mortenson must be stayed to permit arbitration. The parties are bound as a matter of law by the arbitration clause found in Article 16.1 of the construction contract between Mortenson and SSG. (See August 7, 1992 Opinion at page 38). Consequently, the action by plaintiffs against Mortenson must be stayed until arbitration is had in accordance with the terms of the agreement. An order so providing is entered herewith.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: November 24, 1992 [*1277]

## APPENDIX C

District Court Amended Order And Injunction,
809 F Supp 1276

BECHERER v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

Case No. 89-CV-72502 Hon. John Feikens
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION
809 F. Supp. 1259; 1992 U.S. Dist. LEXIS 21071

December 17, 1992, Decided
December 17, 1992, Filed

SUBSEQUENT HISTORY: [**J] Reported at: *809 F. Supp. at 1276.*

PRIOR HISTORY: Original Order and Injunction of December 5, 1992, Reported at:

*1992 U.S. Dist. LEXIS 21070.* Original opinion of November 24, 1992, Reported at:

*1992 U.S. Dist. LEXIS 18343.*

JUDGES: Feikens

OPINION BY: JOHN FEIKENS

OPINION: [*1276]

AMENDED ORDER AND INJUNCTION

This Order and Injunction amends my December 5, 1992, Order and Injunction in this case.

Merrill Lynch's Motions for Injunction against Proceedings having been briefed and argued by counsel, including Thomas Grady, counsel for the plaintiffs in the Florida Action defined

below; the Court having granted the Motions and entered an order for the reasons stated in its Opinion and Order dated November 24, 1992; and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that:

1. All claims, and issues raised therein, by all persons and entities who purchased Hotel Interests in The Registry Hotel at Pelican Bay pursuant to the Private Placement Memorandum and the supplements thereto and/or their successors and assigns (hereinafter collectively "Plaintiffs") against Merrill Lynch and the other defendants in this action have been ruled upon or precluded by this Court. Under the doctrines of res judicata and collateral estoppel, Plaintiffs are bound by this Court's rulings and are barred from relitigating or arbitrating such claims and issues.

2. Plaintiffs in Adams v. Merrill Lynch, Pierce, Fenner & Smith, Twentieth [**2] Judicial Circuit in and for Collier County, Florida, Civil Action No. 92-02776-CA (hereinafter "the Florida Action"), and their respective officers, agents, servants, employees, attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order and Injunction by personal service or otherwise, are permanently enjoined from maintaining or proceeding with all claims against Merrill Lynch except Counts I (non-registration under the Florida Securities Act) and V (suitability) in their First Amended complaint.

3. While this Court lacks authority under *28 U.S.C. § 2283* to enjoin the prosecution of Counts I and V in the First Amended Complaint in the Florida Action because these claims were not pleaded before this Court, this Court has held in its November 24, 1992, Opinion and order that these claims were includable in this action and are therefore precluded by res judicata. This Court requests the Florida Court to dismiss Counts I and V of the First Amended Complaint in the Florida Action with prejudice on res judicata grounds.

4. Plaintiffs, including but not limited to all Claimants in [**3] the National Association of Securities Dealers, Inc. arbitration proceeding entitled In the Matter of Arbitration Between Adams, et al, Claimants, and Merrill Lynch, Pierce, Fenner & Smith, Inc., et al, Respondents, and Plaintiffs', officers, agents, servants, employees, attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order and Injunction by personal service or otherwise, are permanently enjoined from filing, maintaining, [*12771] prosecuting or joining in any pending or future arbitration proceedings (including Adams) or other lawsuits against Merrill Lynch regarding The Registry Hotel at Pelican Bay except Counts I (non-registration under the Florida Securities and Investor protection Act) and V (suitability).

5. This Court retains jurisdiction to enforce this and its other orders.

IT IS SO ORDERED.
John Feikens
United States District Judge
Dated: December 17, 1992

## APPENDIX D

Denial of Becherer Plaintiffs Petition for Rehearing and Rehearing En Blanc (6th Cir.)

Nos. 93-1049/1050/51/52/1164/1221

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. BECHERER, ET AL., Filed April 11, 1995

Plaintiffs-Appellants/
Cross-Appellees,

J. DON ADAMS, ET AL., Order

Appellants/Cross-Appellees,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant-Appellee,

CAN-AMERICAN CORPORATION, ET AL.,

Defendants-Appellees/Cross-Appellants,

FRANK LAVIN, ET AL.,

Defendants-Appellees.

BEFORE: KEITH, KENNEDY, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en blanc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en blanc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/

Leonard Green, Clerk

# APPENDIX E

Sixth Circuit's Grant of Stay

Case Nos. 93-1049/50/51/52/1164/1221

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. BECHERER, et al.,

Plaintiffs - Appellants Cross-Appellees,

V. FILED APRIL 26, 1995

J. DON ADAMS, et al, LEONARD GREEN, CLERK

Appellant Cross-Appellee

V.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.

Defendant-Appellee

CAN-AMERICAN CORPORATION,
et al.,

Defendants - Appellees Cross-Appellants

FRANK LAVIN, et al.,

Defendants - Appellees

---

BEFORE: KEITH, KENNEDY AND SUHRHEINRICH, Circuit Judges

The appellant cross-appellees have moved to stay the issuance of the mandate pending application to the U.S. Supreme Court for a writ of certiorari.

Upon consideration, it is ORDERED that the motion be GRANTED.

Furthermore, the petition is to be filed in the U.S. Supreme Court within 30 days from the date of this order.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

## APPENDIX F

Notice of Pendency of Class Action

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. BECHERER, et al.

Plaintiffs,

V. Civil Action No. 89-72502

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al., Hon. John Feikens

Defendants.

---

NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PERSONS AND ENTITIES WHO PURCHASED HOTEL INTERESTS IN THE PLANNED NON-RESIDENTIAL CONDOMINIUM RESORT HOTEL KNOWN AS THE REGISTRY RESORT HOTEL AT PELICAN BAY, NAPLES, FLORIDA (THE "REGISTRY HOTEL").

On March 12, 1991, the Court issued an Order granting class action status pursuant to Rule 23(a) and (b)(3) of the FederalRules of Civil Procedure to a class (the "Class'') defined as follows:

All persons and entities who purchased hotel interests in the Registry Hotel at Pelican Bay, Naples, Florida pursuant to the February 1. 1984, Private Placement Memorandum, and the Supplements thereto, and ancillary documents including, but not limited to the Unit Sale Agreement, at the October 31, 1986 Closing, and/or their successors and assigns Excluded from the Class are the individual defendants, the members of their

immediate families, the corporate defendants, and the subsidiaries and affiliates of the corporate and individual defendants.

THE COURT'S ORDER GRANTING CLASS ACTION STATUS WAS LIMITED SOLELY TO BREACH OF CONTRACT CLAIMS AGAINST SSG AND THEIR AFFILIATES AS DISCUSSED MORE FULLY HEREIN

If you wish to be a member of the Class, you need do nothing. However, if you wish to be excluded from the Class, you need to provide written notice to Plaintiffs' counsel, postmarked by April 15, 1991, addressed as follows:

ELWOOD S. SIMON, ESQ.
ELWOOD S. SIMON & ASSOCIATES, P.C.
1533 North Woodward Avenue
Suite 315
Bloomfield Hills, MI 48304

The written notice of exclusion should include the following information:

(a) the number and types of Hotel units acquired;

(b) the date acquired; and

(c) the exact name of the Persons or entities that hold title to the Hotel unit(a).

If you request to be excluded from the Class (1) you will not be entitled to share in the recovery in this action if Plaintiffs obtain settlement or judgment against SSG or their affiliates; (2) you may maintain a separate action against SSG and their affiliates on your own behalf; and (3) if the judgment is adverse to Plaintiffs and favorable to Defendants, you will not be barred by that judgment from asserting any claims that you might otherwise have against those Defendants. If you make a written request for exclusion

from the Class, you will receive no further notice concerning this action.

If you do not request exclusion, you will be a class member. You will be represented by the following attorneys:

ELWOOD *S. SIMON* & ASSOCIATES, P.C.
Bloomfield Centre
1533 North Woodward Avenue
Suite 313
Bloomfield Hills, MI 48304

GARWIN, BRONZAFT, GERSTEIN & FISHER
1501 Broadway - Suite 1416
Now York, New York 10036

EUGENE A. SPECTOR & ASSOCIATES
225 South 15th Street
Philadelphia, PA 19102

RUDOLPH, SEIDNER, GOLDSTEIN, ROCHESTIE & SALMON, P.C.
225 South 15th Street
Philadelphia, PA 19102

If Plaintiffs obtain a judgment in favor of the Class, or obtain a settlement on behalf of the Class, as a Class member you will be entitled to a proportionate share of the recovery, after deduction of attorneys' fees and other expenses incurred by plaintiffs and approved by the Court. IF THE DEFENDANTS PREVAIL AND THE JUDGMENT IS ENTERED IN THEIR FAVOR, AS A CLASS MEMBER YOU WILL NOT BE RESPONSIBLE FOR ANY ATTORNEYS' FEES OR, AS A CLASS MEMBER OTHER THEN A NAMED PLAINTIFF, FOR OTHER EXPENSES INCURRED IN THE LITIGATION; HOWEVER, YOU WILL NOT BE ABLE TO TAKE FURTHER LEGAL

ACTION ON YOUR OWN BEHALF AGAINST SSG OR ITS AFFILIATES REGARDING THE CONTRACT ISSUES OF THIS CASE. If you do not understand the legal consequences of exclusion from or inclusion in the Class, it is recommended that you consult with a lawyer or personal advisor of your own choosing.

History Of The Litigation

Plaintiffs filed their Class Action Complaint on August 21, 1989. The Complaint alleges that the named Defendants individually and/or jointly violated the federal securities laws, the Federal Interstate Land Sales Full Disclosure Act, the Federal Racketeering and Corrupt Practices Act and the common law in connection with the sale and/or ownership of Hotel Interests in the Registry Hotel at Pelican Say, Naples, Florida.

Defendants responded to the Complaint by filing motions to dismiss the Complaint on numerous procedural and substantive grounds. The Court, at a hearing hold on July 24, 1990, ordered Plaintiffs to take limited and focused discovery on three specifically limited fraud issues regarding (1) the alleged failure to adequately apprise the investors of the existence and impact of the Ritz Carlton Hotel (at Pelican Bay) on the operation of the Registry Hotel (2) the alleged failure to disclose that certain furniture, fixtures and equipment for the Registry Hotel were to be leased rather than included in the purchase price; and (3) that the Closing occurred at a time when (a) the Hotel was not complete and (b) certain required government certificates, including a Certificate of Occupancy, had not been obtained. After concluding Plaintiffs, limited document and deposition discovery, both Plaintiffs and Defendants submitted factual statements to the Court pertaining to information elicited through such document and deposition discovery relating solely to the three limited areas of alleged fraud.

By opinion and order dated November 20, 1990, the Court dismissed Plaintiffs' fraud claim relating to the alleged failure to adequately apprise investors regarding the existence and impact of the Ritz Carlton Hotel and as a consequence thereof, dismissed Defendant Laventhol & Horwath from the litigation. (Laventhol & Horvath has since filed for Chapter 11 in the Federal Bankruptcy Court). Further, the Court agreed to hear Plaintiffs' alleged fraud claims with regard to the alleged failure to disclose that certain furniture, fixtures and equipment were to be leased rather than included in the purchase price, and that the Closing had occurred prior to the time that the Hotel was complete and before all required government certificates had been obtained.

On December 17, 1990, the Court issued an opinion and Order that the Court had personal jurisdiction over Defendants Cicco, Lavin, Lount and Thorsteinson, and therefore are refused to dismiss the remaining claims against those Defendants on jurisdictional grounds. The Court further found that venue before it was appropriate.

On December 17, 1990, the Court issued a second order directing Plaintiffs to file an Amended Complaint limited to breach of contract causes of action, if any, that they asserted against Defendants. The Court determined that it would first hear breach of contract claims and would stay all other claims pending the outcome or the resolution of the breach of contract claim

On February 1, 1991, Plaintiffs filed the First Amended and Supplemental Class Action Complaint (for breach of contract) ("Amended Complaint"). This Amended Complaint, against all Defendants except Laventhol & Horvath, alleged breaches of various contracts that were utilized in connection with the sale of Hotel Interests in the Registry Hotel. In addition, the Amended Complaint named as a Defendant, Midwest Title Guaranty Company of Florida, the Escrow Agent which is alleged to have acted improperly in releasing from escrow and disbursing the deposits and the mortgage documents at the Closing.

At a hearing on March 12, 1991, the Court determined that Plaintiffs shall proceed against the following Defendants at an edited trial on the contract claims:

Can-American Corporation
Can-Am Realty Corporation
Shelter Seagate Corporation
Garrett G. Carlson
Grant C. Lount
Arni Thorsteinson

The court took under advisement the issue of whether to include M.A. Mortenson, the general contractor, at the trial. The court further determined that the contract claims against all other parties would be stayed pending the outcome of the trial.

At the March 12, 1991 hearing, the Court also granted class certification, as defined herein, limited solely to the issue of the breach of contract claims and directed that this notice be sent to Class members.

Owners of hotel interests in the Registry Hotel are not to interpret the pendency of this litigation, nor any directive of this Court, as indicative of this Court's permission to cease paying mortgage payments to Dominion Financial Investment Corporation and/or its successors in interest.

## ADDITIONAL INFORMATION

All pleadings and papers filed in this action are available for inspection during normal business hours at the offices of the clerk of the United States District Court, Eastern District of Michigan, Southern Division, 133 U. S. Court House and Federal Building, Michigan 48226, and may be inspected for a more, complete description of the claims and defenses. PLEASE DO NOT CALL OR WRITE THE COURT OR THE CLERK'S OFFICE.

All inquiries regarding this case, other than exclusion requests, should be addressed to Elwood S. Simon, Esq., Elwood S. Simon & Associates, P.C., Bloomfield Center, 1533 North Woodward Avenue, Suite 315, Bloomfield Hills, MI 48304; Bruce E. Gerstein, Esq., Garwin, Bronzaft, Gerstein & Fisher, 1501 Broadway, Suite 1416, Now York, New York 10036; Eugene A. Spector, Esq., Eugene A Spector & Associates, 225 South 15th Street, Philadelphia, PA 19102; and Robert M. Roseman., Rudolph, Seidner, Goldstein, Rochestie & Salmon, P.C., 225 South 15th Street, Philadelphia, PA 19102.

_____

John P. Mayer
Clerk of the Court

Dated: March 22, 1991

## APPENDIX G

Notice of Proposed Settlement and
Conditional Class Action Certificate

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. BECHERER, et al.

Plaintiffs, Case No. 89-CV-72502-DT

VS. Hon. John Feikens

MERRILL LYNCH, PIERCE, PENNER SMITH, INC., et al.,

Defendants.
_____/

NOTICE OF PROPOSED SETTLEMENT AND
CONDITIONAL CLASS ACTION CERTIFICATION

To: The Conditional Settlement Class Consisting of All Persons andEntities Who Were Original Purchasers of Hotel Interests In The Registry Hotel at Pelican Bay, Naples, Florida at the October 31, 1986 Closing and Their Direct or Indirect Successors or Assigns Who are Current Unit Owners (Other Than Trustbank Federal Savings Bank and Its Affiliates, Successors and Assigns).

PLEASE READ THIS NOTICE CAREFULLY

In March, 1991, you were mailed a Notice of Pendency of Class Action which informed you that the Court has certified a class of unit purchasers for the Registry Hotel at Pelican Bay (the "Registry Hotel") for the limited purpose of conducting a trial of certain contract claims against Shelter Seagate Corporation ("SSG"), Can-American Corporation, Can-American Realty Corporation, Garrett Carlson, Graham C. Lount and Arni

Thorsteinson (collectively the "SSG Defendants"). All other claims asserted against the SSG Defendants and all claims asserted against all other Defendants were stayed pending a trial of the contract claims asserted against the SSG Defendants.

Prior to the trial, the Court granted Plaintiffs' Motion for Summary Judgment pertaining to Plaintiffs' claim that SSG breached the Unit Sale Agreement when it leased certain furniture, fixtures, and equipment. The Court, however, made no ruling as to what the remedy or damages for this breach of contract would be. As to a second contract claim -- whether the sale closing breached the Unit Sale Agreement and other related contracts -- a trial was held from May 8, 1991 to May 17, 1991. However, the Court has not yet decided (1) whether SSG is liable on this claim; (2) what the remedy will be if SSG is liable; and (3) whether Can-American Realty Corporation, Can-American Corporation, Garrett Carlson, Graham C. Lount and Arni Thorsteinson (who were named Defendants but claimed they were not parties to the Unit Sale Agreement) would be liable for the breach(es) of contract by SSG, a corporation with only nominal capital and limited assets.

The purpose of this Notice is to advise you that:

A. the attorneys for (i)- the Class; (ii) the Association of Unit Owners of the Registry Hotel at Pelican Bay, Inc. (the "AUO"); (iii) the SSG Defendants; (iv) Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch"), Frank Lavin and Martin Cicco (collectively, the "Merrill Lynch Defendants"); and (v) Trustbank Federal Savings Bank, Trustbank Savings F.S.B. and Trustbank Mortgage Center, Inc. f/k/a Dominion Financial & Investment Corporation ("Dominion"), the original mortgage lender on the Registry Hotel project (collectively the "Trustbank Defendants") have agreed on a proposed settlement (the "Settlement") which would dispose of the entire case and other related matters between their respective clients;

B. the court has conditionally certified a new class for consideration of the Settlement (the "Settlement Class" or "Class");

C. the Court has preliminarily approved the proposed Settlement;

D. the Court will hold a hearing on the fairness, reasonableness and adequacy of the Settlement on April 30, 1992 at the United States Courthouse in Detroit, Michigan unless certain Defendants elect to withdraw from the Settlement in the event more than the agreed upon number of Unit Owners exclude themselves from the-Settlement Class; and

E. The Settlement is also subject to approval by the Resolution Trust Corporation (the "RTC"), a federal agency which presently is the conservator for Trustbank Federal Savings Bank, the current holder of the mortgage loans on the Registry Hotel units.

**IMPORTANT: IF YOU PRESENTLY HAVE A MORTGAGE WITH TRUSTBANK FEDERAL SAVINGS BANK, IT IS RECOMMENDED THAT YOU DO NOT PAY OFF OR REFINANCE YOUR MORTGAGE AT THIS TIME OR YOU WILL LOSE MANY OF THE BENEFITS PROVIDED BY THIS SETTLEMENT!**

## 1. HISTORY OF THE LITIGATION

### A. The original Complaint

The named Plaintiffs sued the SSG Defendants, the Merrill Lynch Defendants, Dominion, M.A. Mortenson Company (the contractor for the Registry Hotel project), Winsor/Faricy Architects, Inc. (the architect for the Registry Hotel project) and Laventhol & Horwath (an entity that has since filed for protection from creditors under Chapter 11 of the Bankruptcy Act) regarding the offering, sale and financing of the Registry Hotel. The Complaint alleges, among other things, federal securities fraud, state law fraud, and violations of federal land sales and racketeering laws, claiming:

1) fraud regarding the failure to disclose the existence of the Ritz Carlton Hotel and the reasonableness of the financial projections in the offering materials;
2) concealment of certain Defendants' intention to lease additional furniture, fixtures, and equipment, thereby, burdening Plaintiffs with cost overruns; and
3) fraudulent acceleration and premature execution of the final closing, foreclosing Plaintiffs from exercising certain cancellation rights.

The Defendants filed motions to dismiss these claims. The Court dismissed the first fraud claim with prejudice. However, it denied the rest of the motions without deciding them, giving Defendants the option to renew them at a later date. The Court then ordered Plaintiffs to file an amended complaint limited solely to breach of contract claims and stayed all other claims until after the contract claims were resolved.

**B. The Amended Complaint**

Plaintiffs filed an Amended Complaint limited to alleged breaches of contract against all Defendants and also added Midwest Title Guarantee Company of Florida, the escrow agent for the closing, as a Defendant. Some of the Defendants, including the Merrill Lynch Defendants and the Trustbank Defendants, filed motions to dismiss the contract claims as to them, principally because they denied the existence of contracts on the issues raised in the Amended Complaint. The Trustbank Defendants also moved for dismissal on the basis-that because Trustbank Federal Savings Bank is under RTC conservatorship, the claims and defenses that Plaintiffs could have raised against Dominion are no longer viable. Plaintiffs' counsel opposed these motions.

**C. The Trial**

The Court deferred consideration of Defendants' motions to dismiss the contract claims, deciding first to hold a trial limited to

the contract claims solely against the SSG Defendants. The Court certified a class solely for purposes of that trial.

As discussed earlier, prior to trial, the Court granted Plaintiffs' Motion for Summary Judgment on the furniture, fixture and equipment issue but did not rule on the issues of damages and/or the appropriate remedy. As to a second contract claim -- premature closing -- the Court has not ruled on (1) whether the contracts were materially breached; (2) if the contracts were materially breached, what the appropriate remedy would be; and (3) in the event the Court rules that SSG materially breached the contracts, whether Can-Am Corporation, Can-Am Realty Corporation, Garrett Carlson, Graham C. Lount and Arni Thorsteinson, and/or certain other affiliates, can be held liable for the breach(es) of contract.

## II. THE SETTLEMENT TERMS

### A. Description Of The Conditional Settlement Class

The conditional Settlement Class consists of all original purchasers of hotel interests in the Registry Hotel at the October 31, 1986 closing and their direct or indirect successors and assigns who are current Unit Owners (other than Trustbank Federal Savings Bank and its affiliates, successors and assigns). This is a conditional Settlement Class and, unlike the class certified in March, 1991 for contract claims against the SSG Defendants, the Settlement Class covers <u>all</u> claims against <u>all</u> Defendants, except M. A. Mortenson Company.

### B. What Is Meant By A "Conditional Settlement Class"?

The Court is certifying the Settlement Class for settlement purposes only; that is, conditional upon approval of the Settlement. If the Settlement is not approved, the conditional certification is void and the case will proceed in Court as if there had been no settlement proposal or conditional certification. If you exclude yourself from the Settlement and are a member of the Class certified in March, 1991, your case will continue before this Court. The Court will then complete the trial on the contract

claims, decide the pending motions and, if the case continues, decide whether a class should be certified on other claims and as to other defendants. The Court has not decided whether any other class will be certified if the Settlement is not accepted. The Court has not determined the merits of any claims or defenses.

**THIS NOTICE DOES NOT IMPLY THAT THERE HAS BEEN ANY VIOLATION OF THE LAW OR BREACH OF CONTRACT BY DEFENDANTS (OTHER THAN WITH RESPECT TO SSG'S LEASING OF FURNITURE, FIXTURES AND EQUIPMENT, AND ON THAT ISSUE, THE SSG DEFENDANTS RETAIN THE RIGHT TO APPEAL). DEFENDANTS VIGOROUSLY DENY ANY WRONGDOING IN THIS MATTER.**

**C. The Benefits of The Settlement**

Having weighed the substantial benefits offered by the Settlement against the potential risks of continuing with this litigation, attorneys for the Class recommend the Settlement.

The benefits offered by the Settlement are numerous:

**1. Cash Distributions**

Upon the later of (a) initial Court approval of the Settlement or (b) March 15, 1992:

a) SSG will pay for the benefit of the Class Two Million Three Hundred Fifty Thousand ($2,350,000) Dollars, in cash, which will be placed in an interest bearing escrow account.

b) Merrill Lynch will pay for the benefit of the Class Three Million ($3,000,000) Dollars, in cash, which will be placed in an interest bearing escrow account.

c) The Trustbank Defendants will pay for the benefit of the Class One Hundred Ten Thousand-Four Hundred Three & 12/100 ($110,403.12) Dollars, in cash, which will be placed in an interest bearing escrow account.

These payments may be reduced by an amount not to exceed One Hundred Sixty Thousand Two Hundred Five & 40/100 ($160,205.40) Dollars, depending upon the number of potential Class members who decide to exclude themselves from the Class and the type of unit they own. Such--reductions, however, will not affect in any way the amount Class members may receive, provided they do not exclude themselves from the Settlement Class.

The Five Million Four Hundred Sixty Thousand Four Hundred Three & 12/100 ($5,460.403.12) Dollars, minus exclusion reductions, will first be distributed to current unit owners who did not have a mortgage obligation with the Trustbank Defendants on or before February 7, 1992 and certain former unit owners. Class members who are current unit owners and who did not have a mortgage obligation with the Trustbank Defendants on or before February 7, 1992 will receive a cash distribution for each unit owned (the "Settlement Amount") according to the following schedule:

| | |
|---|---|
| Studio Unit | $20,668.39 |
| Tennis Cabana | $24,906.75 |
| Suite | $28,352.89 |
| Deluxe Suite | $32,041.08 |

In addition, Class members who were original purchasers on October 31, 1986, who subsequently (but prior to February 7, 1992) transferred their respective hotel interest to a nonrelated, non-affiliated third party in a bona-fide sales transaction which resulted in a return to them of less than the original down payment and who did not re-acquire said hotel interest, will receive a cash distribution for each unit owned equal to the lesser of (1) their out-of-pocket loss or (2) the following amounts, to wit:

| | |
|---|---|
| Studio Unit | $2,298.71 |
| Tennis Cabana | $2,767.42 |
| Suite | $3,150.32 |
| Deluxe Suite | $3,560.12 |

**IMPORTANT**. If you are a former unit owner who falls within the above description, you must fill out completely the enclosed claim form establishing your claim to receive the applicable cash distribution and return it, postmarked on or before March 20, 1992 to:

Elwood S. Simon, Esq.
Elwood S. Simon & Associates, P.C.
1533 N. Woodward Avenue, Suite 315
Bloomfield Hills, MI 48304

After the aforementioned cash distributions are made, the Court will determine what portion of the remainder will be awarded to attorneys for the Class in payment of their fees, expenses and disbursements. If there are any funds remaining after administration, they will be distributed to all the Settlement Class members who are current unit owners, proportionately.

## 2. Mortgage Reductions

If you are a current unit owner and you have an outstanding or foreclosed mortgage with the Trustbank Defendants (an "Indebted Class Member") you may receive:

A. a reduction in the principal balance of your mortgage; and

B. a modification of your mortgage's remaining terms, including the interest rate.

These modifications are to be made in the following manner:

1) **Current Loans** - If your loan is in good standing on the first day of the month following final court approval of the Settlement (the "Effective Date"), you will receive on that date a reduction in your mortgage's principal balance equal to the Settlement Amount applicable to your unit and described in Section II(C)(1) of this notice.

2) **Interest Rate** - If your loan is in good standing as of the Effective Date, you will receive the following revision to the interest rate applied to your loan, effective on that date:

i) Loan type: six (6) month adjustable rate mortgage
ii) Index: six (6) month Constant Maturity Treasury Index (weekly), as available forty five (45) days prior to the adjustment payment change date, except for initial rate;
iii) Margin: Two and one-half (2.50%) percent
iv) Adjustment rounding: ± one (1%) percent per adjustment
v) Lifetime cap: six (6%) percent
vi) Initial Modified Rate: Six and one-half (6.5%) percent currently as of January 24, 1992; to be set as of the date of final Court approval)
vii) Amortization: Balance of Thirty (30) years, maturing October 31, 2016. Borrowers whose loans have shorter terms may elect to convert to this 30-year term.

3) **Monthly Payment** - Your monthly loan payment will be adjusted to reflect the reduction in principal, the new interest rate and, if applicable, the new loan term.

4) **Loans In Arrears** - If your loan is not in good standing on the Effective Date you -will have.-ninety (90) days following the Effective Date to bring your loan into good standing and receive the benefits provided herein. If you fail to restore your loan to good standing within ninety (90) days following the Effective Date, the mortgage reduction benefits described in Section II(C)(2), (a) through (c) .inclusive, of-this notice may be forfeited retroactively to the Effective Date. As part of the Settlement, the Trustbank Defendants will waive all late fees, charges, default interest, or other penalties for Indebted Class Members whose loans are restored to good standing.

5) **Economic Hardship** - If your loan is in arrears as a result of economic hardship or changed financial circumstances arising subsequent to your original loan application, and you anticipate that you will not be able to bring your loan current within 90 days after the Effective Date, you may ask for financial assistance from Trustbank Federal Savings Bank by sending a request and supporting financial information to Trustbank Federal Savings Bank within-thirty (30) days-after the Effective Date. **PURSUANT TO THE TERMS OF THE SETTLEMENT, IN THE EVENT INDEBTED CLASS MEMBERS DEMONSTRATE FINANCIAL HARDSHIP THAT WOULD PREVENT REALIZATIONOF THE BENEFITS OF THIS TRUSTBANK IS OBLIGATED TO USE ITS BEST EFFORTS AND NEGOTIATE FAIRLY AND IN GOOD FAITH, ON A CASE BY CASE BASIS: (i) TO PRECLUDE LOSS OF THE SETTLEMENT BENEFITS OR (ii) WITH RESPECT TO INDEBTED CLASS MEMBERS WHO CAN NEITHER BRING THEIR LOANS CURRENT WITHIN THE NINETY (90) DAY PERIOD PROVEDED HEREUNDER NOR CONTINUE TO PAY THEIR LOANS, AS MODIFIED HEREUNDER, TO GRANT OTHER RELIEF REASONABLE UNDER THE CIRCUMSTANCES.**

6) **Foreclosed Loans** - If your unit has already been foreclosed, you may still participate in the Settlement by accepting reconveyance of your unit from Trustbank Federal Savings Bank within 90 days of the Effective Date. To do so, however, you will have to pay all taxes, recording fees and costs of the reconveyance. The loan must be reinstated as if it had continued to exist without foreclosure and must be brought into good standing at the time ofthe reconveyance.

7) With the exception of the foreclosed units (which are required to pay taxes, recording fees, and other costs of reconveyance only), Indebted Class Members will not be required to pay any refinancing costs in connection with the modifications to their mortgage loans provided herein.

8) The principal balance reduction, revised interest rate and if pplicable, new loan term will be confirmed in a Modification Agreement which will be signed by Trustbank Federal Savings Bank and attached to your mortgage note.

9) As noted earlier, any Indebted Class Member who pays off a mortgage loan between February 7, 1992 and final Court approval of this Settlement shall not be entitled to-receive the Settlement Amount with respect to the unit secured by that loan, either in the form of loan modifications or cash.

**3. Other Terms**

A. In addition to the Two Million Three Hundred Fifty Thousand ($2,350,000) Dollar payment it will make, SSG will resign as AUO manager and agent of the unit owners effective five (5) days after the Settlement receives final Court approval. SSG will relinquish its claimed agency fee and/or any other claim of entitlement to fees from the unit owners and/or the AUO.

B. A SSG related entity will transfer its residual interest in the Registry Hotel to an entity to be owned by Class members who do not exclude themselves and Plaintiffs' counsel (to the extent the Court awards an interest to counsel as part of their fee for procuring this benefit). Any fees payable with respect to that residual interest will enure in the future to that entity, for the benefit of the Class, but cannot be assured and/or calculated with any certainty at the present time.

**4. Escrow Funds That Will Be Freed Up Upon Final Approval of the Settlement**

Certain prior cash flow funds have been placed into escrow with the United States District Court for the Eastern District of Michigan,-Southern Division, Case No. 90-CV-73440-DT, pursuant to an interpleader action initiated by the Registry Hotel Corporation against SSG, et al., which case is separate and apart from the instant litigation. In addition, other cash flow funds are presently held in escrow by the Law Firm of Quarles & Brady and by Midwest Title Guarantee Company of Florida for those Indebted Class Members who were or are in default on their mortgage loan obligations with Trustbank Federal.Savings Bank.

These escrowed funds, when distributed pursuant to, and as part of, the proposed Settlement, will be available to reduce mortgage indebtedness and, thus, begin the process to bring into good standing any mortgage loan which is currently in default. To the extent that your mortgage loan is currently in good standing, the distribution of these funds will come to you unrestricted to the extent it is determined you are entitled to said funds.

**D. Considerations Made In Negotiating the Settlement**

In deciding to endorse the Settlement, attorneys for the Class took into account the following legal considerations:

1) Because SSG is a corporation with only nominal amounts of capital and limited resources, Plaintiffs might be unable to enforce any judgment obtained against the corporation;

2) As a matter of law, SSG's affiliates and officers might not be held liable for SSG's actions;

3) Even if SSG were found liable, the other Defendants might not be liable for the claims asserted;

4) Plaintiffs' claims against the Trustbank Defendants might not be sustainable because Trustbank Federal Savings Bank, the parent company of the mortgage lender, is in conservatorship under the authority of the RTC.

5) It is believed that once the Settlement is consummated, the Registry Hotel will be able to operate in a more favorable environment unencumbered by the distractions of the various disputes and lawsuits.

**BASED ON THEIR REVIEW OF THE SUBSTANTIAL BENEFITS OFFERED BY THE SETTLEMENT AND THE RISKS POSED BY CONTINUED LITIGATION OF THIS ACTION, ATTORNEYS FOR THE CIASS BELIEVE THAT THE SETTLEMENT IS FAIR, REASONABLE AND IN THE BEST INTERESTS OF THE CIASS MEMBERS.**

**IN ADDITION, ATTORNEYS FOR THE AUO HAVE REVIEWED THE SETTLEMENT AND BELIEVE THAT THE PROVISIONS THEREOF RELATING TO THE AUO ARE FAIR, REASONABLE AND IN THE BEST INTERESTS OF THE CLASS MEMBERS.**

**E. Effect of Settlement on Your Claims**

Participation in the Settlement will result in the following:

1. The Settlement Class members will assign their claims against Winsor/Faricy Architects, Inc. and Midwest Title Guarantee Company of Florida to SSG and Merrill Lynch.

2. Claims against M. A. Mortenson Company and any subcontractors who participated in the construction of the Registry Hotel will be excluded from the Settlement.

3. Except as set forth above, by participating in the proposed Settlement, you will release all claims you have against (a) the

corporate Defendants, including the SSG Defendants, Merrill Lynch, the-Trustbank Defendants, and their affiliated companies, successors, and assigns and their past and present officers, employees, directors, and shareholders; (b) the individual Defendants and their heirs, personal representatives, successors and assigns; (c) the RTC; and (d) the AUO and members of its Board of Directors, arising out of this case, your purchase of units in the Registry Hotel, its operation, and any contracts associated with the foregoing. The case will then be dismissed and may not be refiled.

4. By participating in the Settlement, you will be released from all claims that the Merrill Lynch Defendants, the SSG Defendants and the Trustbank Defendants have against you arising out of this case or your purchase of units in the Registry Hotel, except as stated in the Settlement Agreement. 5. As a condition of the Settlement, all the parties to the Settlement will release the AUO from all claims of liability.

This Settlement is subject to, and becomes final only upon, final, non-appealable approval by the Court as well as approval by the RTC.

This is only a summary. The complete Settlement terms are stated in a-Settlement Agreement on file with the Court.

## III. REQUESTS FOR EXCLUSION

You may request exclusion-from the Settlement Class if you do so and the Settlement is approved, **YOU WILL BE EXCLUDED FROMSHARING IN THE BENEFITS OF THE SETTLEMENT** and from the binding approval of the Settlement.

In order to continue pursuing your claims (other than the specific breach of contract claims which were the subject of the court proceedings and trial between May 7, 1991 and May 17, 1991 against the SSG Defendants), you will have to retain your

own attorney and file your own suit, at your own expense. If you exclude yourself from the Settlement Class, you will remain a member of the class that was certified for purposes of the breach of contract proceedings against the SSG Defendants. However, any subsequent decision made by the Court in those proceedings may have an adverse effect on other claims you may have against the SSG Defendants, or claims you may have against the other Defendants.

**IF YOU ARE A CURRENT UNIT OWNER AND WISH TO ACCEPT THE SETTLEMENT, YOU DO NOT HAVE TO DO ANYTHING AT THIS TIME.**

**IF YOU ARE A <u>FORMER</u> UNIT OWNER AND WISH TO ACCEPT THE SETTLMENT, YOU MUST FULL OUT COMPLETELY THE ENCLOSED CLAIM FORM AND RETURN IT TO PLAINTIFFS' COUNSEL POSTMARKED ON OR BEFORE MARCH 20, 1992, AS DISCUSSED IN SECTION II(C)(1) ABOVE.**

**IF YOU WISH TO BE EXCLUDED FROM THE SETTLEMENT CLASS,** you must execute a written request for exclusion and send it to attorneys for the Class, postmarked on or before March 9, 1992. The request must be made in writing, signed by you and.state that you wish to be excluded from the Settlement Class; it should be mailed to:

Elwood S. Simon, Esq.
ELWOOD S. SIMON & ASSOCIATES, P.C.
1533 N. Woodward Avenue, Suite 315
Bloomfield Hills, Michigan 48304-2864

If you do not request exclusion from the Settlement class, you may, if you so desire, have your own attorney enter an appearance, at your expense.

If you do not exclude yourself from the Class, and do not appear through your own counsel, your interests will be represented by Plaintiff Class representatives and their counsel, as counsel l for the Class. Plaintiffs are represented by the following attorneys:

ELWOOD S. SIMON & ASSOCIATES, P.C.
1533 N. Woodward Avenue
Suite 315
Bloomfield Hills, Michigan 48304-2864

**IF YOU REMAIN IN THE CLASS,, YOU WILL NOT HAVE TO PAY ANY OF THE COSTS OF LITIGATION BECAUSE THE CASH SETTLEMENT FROM SSG, MERRILL LYNCH AND THE TRUSTBANK DEFENDANTS WILL BE USED TO PAY THOSE COSTS.**

## IV. ATTORNEY FEES

Plaintiffs' counsel intend to apply to the Court for an award of attorney fees, not to exceed twenty five (25%) percent of the maximum aggregate benefit to the Class, plus reimbursement of all reasonable expenses and disbursements incurred by Plaintiffs' counsel.

## V. SETTLEMENT HEARING

A hearing on this Settlement will be held before United States District Judge John Feikens in his courtroom on the 8th Floor, United States Courthouse, 231 Lafayette, Detroit Michigan, at 9:00 a.m. on April 30, 1992 for the purpose of determining whether the Court should approve finally the Settlement as fair, reasonable and adequate and dismiss the case. If the Settlement is approved, the amount to be awarded by the Court to your attorneys for their fees, costs and disbursements will come from the funds paid and/or other benefits obtained from the SSG Defendants and Merrill Lynch.

**SETTLEMENT CLASS MEMBERS WHO DO NOT OPPOSE THE PROPOSED SETTLEMENT DO NOT NEED TO APPEAR AT THE HEARING OR FILE ANY PAPERS.**

If you do not exclude yourself from the Settlement Class, you may, if you wish, appear at the hearing and object to the Settlement or the request for attorney fees. However, in order to have the right to speak, you must file in person or by mail two copies of a written notice of objection by April 3, 1992 with the Clerk of the Court at the United States Courthouse, 231 Lafayette Avenue, Detroit, Michigan 48226, and by mailing copies to the following attorneys:

Elwood S. Simon, Esq.
ELWOOD S. SIMON &
ASSOCIATES, P.C.
Bloomfield Centre
1533 N. Woodward Avenue
Suite 315
Bloomfield Hills, MI
48304-2864

Douglas G. Graham, Esq.
Dennis K. Egan, Esq.
BUTZEL LONG
150 W. Jefferson, Suite 900
Detroit, Michigan 48226

Steve Gaskins, Esq.
COSGROVE, FLYNN,
GASKINS & HASKELL
333 S. 7th Street
2900 Lincoln Center
Minneapolis, MN 55402

Jonathan T. Walton, Jr.
CLARK, KLEIN &
BEAUMONT
1500 First Federal Building
1001 Woodward Avenue
Detroit, MI 48226-1962

Any notice of objection must include the name of this case, Judge Feikens' full name and the case number, as shown on the front page of this notice.

## VI. EFFECT OF SETTLEMENT APPROVAL

If the Settlement is approved, the Court will enter an order dismissing the case on the merits, with prejudice, as to the SSG

Defendants, the Merrill Lynch Defendants and the Trustbank Defendants, and without prejudice as to Winsor/Faricy Architects, Inc. and Midwest Title Guarantee Company of Florida. Unless you have excluded yourself from the Class, upon final Court approval, you will be bound by, and receive the benefits of, the Settlement, including the dismissals. If the Settlement is approved and you have excluded yourself from the Class, the Court will determine the contract claims as they apply to you as a member of the previously certified class.

APPROVED BY ORDER OF Hon. John Feikens, United States District Court

## APPENDIX H

Notice of Proposed Settlement and
Conditional Class Action Certificate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. BECHERER, et al.,
Plaintiffs,

Civil Action No. 89-72502

V

Hon. John Feikens

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC., et al.

Defendants.
_____/

ORDER

WHEREAS, on March 15, 1991, this court certified a Class for purposes of a trial for breach of contract claims against the Shelter Seagate defendants, defined as follows:

> All persons and Entities Who Purchased Hotel Interests pursuant to the February 1, 1984 Private Placement memorandum, and the supplements thereto, at the October 31, 1986 Closing, and/or their Successors and/or Assigns and who were allegedly damaged thereby;

and only one individual elected to be excluded from that Class;

WHEREAS, the court appointed as Class Counsel the law firms of Elwood S. Simon & Associates; Garwin, Bronzaft, Gerstein & Fisher; and Spector & Roseman;

WHEREAS, Class Counsel conducted a bench trial on the breach of contract issues against the Shelter Seagate defendants between May 7, 1991 and May 17, 1991;

WHEREAS, following said trial, Class Counsel entered into settlement negotiations with counsel for all defendants;

WHEREAS, the law firm of Quarles & Brady, which represents the Association of Unitowners ("AUO") in related litigation entitled The Registry Hotel Corporation v. Shelter Seagate Corporation, et al., Case No. 90-CV-73440-DT, participated in said settlement negotiations on behalf of AUO;

WHEREAS, Class Counsel, counsel for AUO and certain defendants reached a settlement in principle of this action and the related litigation on February 14, 1992;

WHEREAS , the court preliminarily approved the proposed settlement on February 14, 1992 and conditionally certified a second Settlement Class defined as follows:

> All persons and entities (the "Unit Owners") who were (i) original purchases of hotel interests in the Registry Hotel at Pelican Bay, Naples, Florida (the "Registry Hotel") at the October 31, 1986 closing, and (ii) their direct or indirect successors or assigns who are current Unit Owners (other than Trustbank Federal Savings Bank and its affiliates, successors and assigns);

WHEREAS, the Settlement Class supplements but does not supersede the first Class certified by the court on March 15, 1991, such that any persons who exclude themselves from the Settlement Class remain members of the first Class;

WHEREAS, notice of the proposed settlement was mailed to Settlement Class members on February 14, 1992, notifying them

of the proposed settlement and their right to opt out of the Settlement Class on or before March 9, 1992;

WHEREAS, Attorney Thomas R. Grady, who purportedly represents approximately 57 individuals who may have elected to exclude themselves from the Settlement Class, but does not represent the Settlement Class, has sought to intervene in the settlement process by writing letters directing Class Counsel and counsel for AUO to cease communicating with said individuals;

WHEREAS, this matter was brought to the court's attention and the court determined it had jurisdiction over Attorney Thomas R. Grady -- inasmuch as he represents Class members in their individual capacities and, accordingly, issued an Order To Show Cause as to duties and responsibilities of attorneys for plaintiff class and individuals who represent Class members on March 12, 1992, and ordered Attorney Thomas R. Grady, in his purported capacity as attorney for certain individuals who are Class members, to appear before the court on March 19, 1992 to show cause why his demands to limit certain Class members, access to information was inappropriate;

WHEREAS, the court has previously determined and affirmed that Class Counsel and counsel for AUO are under a duty to provide accurate information to their clients, including all members of the certified Class, in order to allow them to make an informed decision concerning the proposed settlement, including effects of electing to exclude themselves from the Settlement Class;

WHEREAS, the court is concerned that Attorney Thomas R. Grady may not be communicating accurate, objective and legally sound analysis of the settlement and its ramifications to his clients; and

WHEREAS, Attorney Thomas R. Grady failed to personally appear before this court and respond to its inquiries as ordered;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Class Counsel and counsel for AUO (or such other persons as they may appoint in their discretion, including Class representatives) are hereby permitted, and have the duty, to continue communicating directly with their clients, including all members of the Class certified on March 15, 1991, concerning the proposed settlement of this action to assure that they have adequate and accurate information upon which to make an informed decision as to whether to elect to exclude themselves from the Settlement Class.

2. Both Class Counsel and the attorney who represents individuals who are Class members must impart only accurate, objective, balanced information regarding the settlement. Any statement made by any attorney suggesting that litigation can be commenced in state court by any Class member who opts out of the settlement is inappropriate inasmuch as this court has exclusive jurisdiction over this matter.

3. By stipulation the settling parties have extended the deadline for opting out of the settlement until April 14, 1992, and the date upon which Resolution Trust Company must begin its approval process for the settlement is extended until April 15, 1992.

4. This Order is sent by facsimile to counsel for the settling parties and to Attorney Thomas R. Grady. A copy of the Order, in accordance with Federal Rules, will follow by mail.

5. Attorneys for the Class are directed to transmit this Order to each member of the Class.

IT IS SO ORDERED.

JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

DATED: March 24, 1992

# APPENDIX I

Applicable Constitutional and Statutory Provisions

## RELEVANT CONSTITUTIONAL PROVISIONS/STATUTES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

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No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

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A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C.A. §283 (West 1994).

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A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. §2

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## RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or

substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by

a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural

matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

FED. R. CIV. P. 23

Supreme Court, U.S.
FILED
JUL 25 1995
CLERK

(2)

No. 94-1968

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

J. DON ADAMS, et al.,
*Petitioners,*

RICHARD C. BECHERER, et al.,
*Plaintiffs/Respondents,*

*v.*

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
*Defendants/Respondents.*

## BRIEF OF LEHILL PARTNERS, L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JONATHAN T. WALTON, JR.
*(Counsel of Record)*
LAURA S. STAFFORD
Counsel for Respondent LeHill Partners, L.P.

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BEST AVAILABLE COPY

41pp

## QUESTIONS PRESENTED

### I.

Whether review by this Court of the Sixth Circuit's (implicit) holding that the district court had *in personam* jurisdiction over petitioners is inappropriate, given that: (a) facts already in the record support this conclusion and the proceedings on remand may reveal additional facts pertinent to this issue, rendering review at this time premature; (b) the Sixth Circuit's holding does not involve important questions of federal law; and (c) the Sixth Circuit's holding does not conflict with well-established precedent.

### II.

Whether review by this Court of the Sixth Circuit's holding that the doctrine of virtual representation may be a viable means of barring petitioners from relitigating claims already resolved by the district court is inappropriate, given that: (a) facts already in the records support this conclusion and the proceedings on remand may reveal additional facts pertinent to this issue, rendering review at this time premature; (b) the Sixth Circuit's holding does not involve important questions of federal law; and (c) the Sixth Circuit's holding does not conflict with well-established precedent.

### III.

Whether review by this Court of the Sixth Circuit's failure to hold that the district court could not issue an injunction under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, is inappropriate, given that: (a) the Sixth Circuit vacated the injunction, and the district court may decide on remand not to reissue it, rendering review at this time premature; (b) the Sixth Circuit's holding does not involve important questions of federal law; and (c) the Sixth Circuit's holding does not conflict with well-established precedent.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | v |
| SUMMARY OF THE ARGUMENT | vii |
| STATEMENT OF THE CASE | 1 |
| ARGUMENT | 6 |
| I. THE SIXTH CIRCUIT'S IMPLICIT HOLDING THAT THE DISTRICT COURT CORRECTLY EXERCISED *IN PERSONAM* JURISDICTION OVER PETITIONERS IS INAPPROPRIATE FOR REVIEW BY THIS COURT | 6 |
| A. Review of this issue would be premature and would not resolve important questions of federal law | 6 |
| B. The Sixth Circuit's holding is in keeping with established law | 6 |
| 1. Petitioners consented to be subject to the jurisdiction of the district court | 7 |
| 2. The district court obtained *in personam* jurisdiction over petitioners with respect to all of their claims when they voluntarily became parties to the contract class action | 9 |
| 3. The district court had jurisdiction over petitioners with respect to their fraud and securities claims because petitioners acted as if they were parties and impliedly consented to the court's exercise of jurisdiction | 12 |

Page

II. THE SIXTH CIRCUIT'S HOLDING THAT THERE WERE INDICIA THAT PETITIONERS WERE VIRTUALLY REPRESENTED BY THE NAMED PLAINTIFFS WITH RESPECT TO THEIR FRAUD AND SECURITIES CLAIMS IS NOT APPROPRIATE FOR REVIEW BY THIS COURT ..... 14

A. Review of this issue would be premature, and would not resolve important questions of federal law ..... 14

B. The Sixth Circuit did not deviate from accepted precedent or violate petitioners' constitutional right to due process ..... 15

1. The Sixth Circuit did not hold that virtual representation is a substitute for personal jurisdiction ..... 15

2. The Sixth Circuit correctly enunciated the test for virtual representation, and correctly held that the factual developments to date suggested that petitioners may be barred from pursuing their fraud and securities claims under that doctrine ..... 15

III. THE SIXTH CIRCUIT'S FAILURE TO HOLD THAT THE DISTRICT COURT COULD NOT ISSUE AN INJUNCTION UNDER THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT IS NOT APPROPRIATE FOR REVIEW BY THIS COURT ..... 18

A. Review of this issue would be premature, and would not resolve important questions of federal law ..... 18

Page

B. The Sixth Circuit did not hold that the Anti-Injunction Act excuses the requirement that a court must have personal jurisdiction over the person that it seeks to enjoin, and therefore its holding is in keeping with established law ..... 19

CONCLUSION ..... 21

## TABLE OF AUTHORITIES


Page

**Cases**

*Adam v. Saenger,* 303 U.S. 59 (1930) ..... 10

*Carden v. Arkoma Associates,* 494 U.S. 185, 110 S.Ct. 1015 (1990) ..... 6

*Carlough v. Amchem Products,* 10 F.3d 189 (3d Cir. 1993) ..... 19-20

*Dewey v. Almy Chemical Co.,* 25 F.Supp 1021 (E.D.N.Y. 1939) ..... 11

*General Contracting & Trading v. Interpole,* 940 F.2d 20 (1st Cir. 1991) ..... 11

*General Foods Corp. v. Massachusetts Dep't of Public Health,* 648 F.2d 784 (1st Cir. 1981) ..... 16-17

*Hanson v. Denckla,* 357 U.S. 235 (1958) ..... 10

*Huff v. Pharr,* 748 F.2d 1553 (11th Cir. 1984) ..... 10-11

*International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945) ..... 6, 10

In re *Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), *cert denied,* 493 U.S. 959 (1989). ..... 13, 20

*Irving Trust Co. v. Nationwide Leisure Corp.,* 562 F.Supp. 960 (S.D.N.Y. 1982) ..... 11, 13

*Jackson v. Hayakawa,* 605 F.2d 1121 (1979), *cert denied,* 445 U.S. 952 (1980) ..... 8

*Phillips Petroleum v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965 (1985) ..... 7

*Pugh v. Frierson,* 221 F. 513 (6th Cir. 1915) ..... 16

Page

*Southwest Airlines Co. v. Texas International Airlines,* 546 F.2d 84 (5th Cir. 1977) ..... 16

*World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1979) ..... 10

**Statutes**

28 U.S.C. §2283 ..... 18

**Court Rules**

S.Ct.R. 10.1 ..... 6

**Treatises**

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §4457 (1981) .. 16

## SUMMARY OF THE ARGUMENT

Petitioners raise several issues which they assert this Court should review. These issues are:[1]

1. The Sixth Circuit's (implicit) holding that the district court properly exercised *in personam* jurisdiction over petitioners with respect to their fraud and securities claims.

2. The Sixth Circuit's holding that the doctrine of virtual representation may be a viable means of barring petitioners from relitigating claims already resolved by the district court.

3. The Sixth Circuit's failure to hold that the district court could not issue an injunction under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283.

These issues are not appropriate for review, for the following reasons:

1. The Sixth Circuit has remanded this case to the district court for factual findings to determine the extent of petitioners' involvement in the litigation before the district court. The extent of petitioners' involvement in that litigation is relevant to the determination of the existence of both personal jurisdiction and virtual representation.[2] No decision has been issued by the district court because the Sixth Circuit stayed remand proceedings pending the outcome of this petition. Until the district court makes these findings, review by this Court is premature. Furthermore, the record reveals that the district court properly exercised *in personam* jurisdiction over petitioners, as

[1]Petitioners also request review of the Sixth Circuit's failure to vacate the "Gag Order" entered by the district court. As that issue does not concern this respondent, it is not addressed herein.

[2]Respondent maintains, however, that no further factual findings are necessary to support the district court's excercise of *in personam* jurisdiction over petitioners, as is set forth *infra*.

they consented to submit to the court's jurisdiction when they opted-in as plaintiffs in the Fed.R.Civ.P. 23(b) class certified by that court.

2. The test for virtual representation, as enunciated by the Sixth Circuit, is in keeping with generally accepted principles of law. Furthermore, until the proceedings on remand are concluded, review is premature, as the district court may determine that the facts do not support a finding of virtual representation, thereby mooting petitioners' petition. Finally, the Sixth Circuit was correct in holding that the factual record to date demonstrates that petitioners may be precluded from future litigation under the doctrine of virtual representation.

3. The Sixth Circuit vacated the district court's injunction, holding that the injunction could only issue should the remand proceedings reveal that petitioners were virtually represented in the district court litigation. Until the remand proceedings are concluded, review of this issue is premature, as the district court may determine that no virtual representation existed and may refuse to reissue the injunction, in which case petitioners' petition will be mooted.

## STATEMENT OF THE CASE

On August 12, 1989, six individuals ("the named plaintiffs") commenced this action in the United States District Court for the Eastern District of Michigan, as a proposed Fed.R.Civ.P. 23(b)(3) class action. The named plaintiffs, and the class members they sought to represent, were investors (the "Unit Owners") in The Registry Hotel at Pelican Bay (the "Hotel"), a resort hotel in Naples, Florida. The Unit Owners had each purchased individual interests in the Hotel, consisting of fee simple ownership of a hotel unit, an interest in the common areas of the Hotel, and the right to share proportionately in all profits generated by the Hotel's commercial areas. Each Unit Owner is a member of the Association of Unit Owners of the Registry Hotel at Pelican Bay, Inc. ("AUO"), a condominium association.

The named plaintiffs' complaint alleged various claims, including securities fraud violations, common law fraud, breach of contract, and federal and state RICO violations. The defendants included: the Hotel's developer, Shelter Seagate Corporation ("SSG"), and individuals and entities affiliated with SSG; Merrill Lynch, Pierce, Fenner & Smith, which had marketed the investment; Dominion Financial & Investment Corp. (which changed its name to Trustbank Mortgage Center, Inc. ("Trustbank")), a subsidiary of the savings and loan that provided first mortgage loans to finance the Unit Owners' purchases; an accounting firm; and the architectural firm and general contractor involved in the Hotel's construction. Respondent LeHill Partners, L.P. has succeeded to Trustbank's rights with respect to the mortgage loans, and has been substituted as a party by order of the Sixth Circuit dated May 8, 1995. LeHill acquired its interest from the Resolution Trust Corporation ("RTC"), which had taken over Trustbank's position after the insolvency of Trustbank's parent institution.

On March 15, 1991, the district court certified a Rule 23(b)(3) plaintiff class ("the contract class") with respect to the breach of contract claims asserted against SSG. In accordance with the requirements of Rule 23, notice of the pendency of the

class action was sent out to all Unit Owners, including petitioners. All of the petitioners opted to be included as plaintiffs in the litigation. A bench trial was held on the contract claims, and the Unit Owners were awarded a judgment for $6.7 million against SSG.

Before and during the pendency of this case, a number of Unit Owners went into default on their mortgage loans. Many of them deliberately withheld loan payments in an attempt to pressure Trustbank into a settlement. The president of the AUO actively encouraged this tactic. Virtually all of the petitioners herein currently remain in default on their loans.

Trustbank commenced foreclosure actions in Florida state court in response to the loan defaults. In defending against foreclosure, a number of the Unit Owners, including many of the petitioners, filed counterclaims mirroring the allegations and charges of the complaint in this action. Those Unit Owners then argued to the Florida courts that foreclosure should be stayed until the district court in this action adjudicated the matters common to the complaint herein and the Florida counterclaims.

Petitioner Dick Dykes spearheaded this tactic by the Unit Owners in foreclosure. Petitioners' co-counsel, Thomas R. Grady, represented Mr. Dykes in the foreclosure. The named plaintiffs' attorney, Elwood Simon, appeared as "of counsel" on papers Mr. Grady filed in the foreclosure. In those papers, Mr. Grady sought to stay the foreclosure by arguing, *inter alia:*

> ***A stay is particularly appropriate where, as here, the outcome of the Class Action Lawsuit (in which TrustBank is a defendant) would have res judicata effect on the Counterclaim and Affirmative Defenses of the Defendant [i.e. Mr. Dykes].*** The test for staying a cause of action pending simultaneously with another action instituted in a separate court is that the " . . . identity of the matters involved must be such that a judgment in the first suit could be pleaded in bar as a former adjudication." *Horter v. Commercial Bank &*

> *Trust,* 126 So. 909, 912 (Fla. 1930). ***Any judgment in the Class Action Lawsuit will act as an estoppel to Trustbank and the Defendant from litigating issues common to both causes of action which are actually litigated and decided in the prior action.***

(Defendant's Response to Plaintiff's Motion to Sever and Stay Affirmative Defenses and Counterclaim and Supporting Memorandum of Law, Appendix hereto, at 8a.) (emphases added)[3]

Mr. Grady's arguments ultimately carried the day. Although the Florida trial court refused to stay foreclosure, the Florida Second District Court of Appeal reversed and stayed the foreclosure against Mr. Dykes pending the outcome of this case. *Dykes v. Trustbank Savings F.S.B.,* 567 So.2d 958 (Fla. Ct. App. 1990). In its opinion, the Florida Court of Appeal held, in part:

> While we sympathize with respondent's contention that a stay of the foreclosure action will force it to wait until after the federal action is decided in order to "pursue its collateral," i.e. title to the hotel units, this consideration cannot be determinative of our resolution of this matter.

*Id.* at 959-60.

The issues in this case relating to the mortgage loans were decided on August 7, 1992 when the district court issued its opinion and order granting motions for summary judgment of various defendants, including Trustbank, which by that point was subject to conservatorship by the RTC. *Becherer v. Merril Lynch, Pierce Fenner & Smith,* 799 F.Supp. 755 (E.D.Mich. 1992). With respect to Trustbank, the district court held that the doctrine this Court established in *D'Oench Duhme & Co. v. FDIC,* 315 U.S. 477 (1942) barred all claims challenging the validity of the mortgage loans. The district court also ruled that the fraud and securities fraud claims against Trustbank should be dismissed because reliance could not be shown and Trustbank's allegedly

[3]These papers have not yet become part of the record due to the Sixth Circuit's stay of the proceedings on remand. If and when those proceedings are renewed, the factual record from the foreclosures will be fully developed.

fraudulent actions had not been undertaken "in connection with" a sale of securities. *Id.* at 772-75.

After the district court had issued its final opinion, petitioners, represented by attorney Thomas Grady, attempted to bring their fraud and securities claims against Merrill Lynch in Florida state court, although those claims had already been decided by the district court. Merrill Lynch moved the district court to enjoin petitioners' state court proceedings.

On November 24, 1992, the district court held, *inter alia,* that petitioners were bound, under the doctrines of res judicata and collateral estoppel, by the findings of fact and conclusions of law set forth in its August 7, 1992 opinion. *Becherer v. Merrill, Lynch, Pierce, Fenner & Smith*, 809 F. Supp 1259, 1269 (E.D.Mich. 1992). Specifically, the district court held that petitioners were bound by the court's judgment because petitioners were parties in the case, were in privity with the named plaintiffs and were adequately represented by them — an accepted standard for application of res judicata and collateral estoppel. On December 17, 1992, the district court issued an injunction barring petitioners from relitigating against Merrill Lynch, in any forum, the claims and issues previously ruled upon and decided by the district court.

Petitioners appealed the district court's decision. On appeal, the Sixth Circuit recognized the doctrine of adequate representation ("virtual representation") as a viable means of invoking the bars of res judicata and collateral estoppel. *Becherer v. Merrill, Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054, 1069-70 (6th Cir. 1995). However, the Sixth Circuit determined that the district court had incorrectly enunciated the criteria for virtual representation, that a more stringent test should have been used, and therefore vacated the district court's injunction. Finally, the Sixth Circuit held that, as there were indicia that petitioners may indeed have been "virtually represented" by the named plaintiffs under the narrower test, the district court should, on remand, make findings of fact on that issue. Before that issue could be

resolved, the Sixth Circuit stayed the district court proceedings pending the outcome of the instant petition.[4]

Petitioners now seek review of the Sixth Circuit's implicit holding that that the district court properly exercised personal jurisdiction over them. They maintain that the district court never obtained jurisdiction over them, and that personal jurisdiction is a prerequisite for the application of the doctrine of virtual representation. They also argue that this alleged jurisdictional defect vitiates the district court's efforts to enjoin them from future litigation of already-decided issues. Petitioners further argue that the Sixth Circuit incorrectly held that, depending on the district court's factual findings on remand, their case might be an appropriate one for application of the doctrine of virtual representation.

Petitioners' petition should be denied. The district court has not resolved the issue of whether petitioners were virtually represented by the named plaintiffs, and whether they are therefore barred from future litigation and arbitration of already-decided issues. As petitioners' rights have not yet been conclusively affected because no final decision has been issued, petitioners lack standing to request review of the Sixth Circuit's opinion. Furthermore, to the extent that discovery is propounded on remand concerning the issue of virtual representation, that discovery will also be relevant to the issue of personal jurisdiction, as there are elements common to both. Until those factual findings have been made, review by this Court is premature. Finally, the Sixth Circuit's implicit holding regarding jurisdiction, and its express holding regarding virtual representation, do not conflict with established precedent, and do not involve important questions of federal law.

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[4]The Sixth Circuit also upheld the district court's dismissal of the claims against Trustbank/RTC. Neither petitioners nor the named plaintiffs have sought further review of that ruling.

## ARGUMENT

### I.

### THE SIXTH CIRCUIT'S IMPLICIT HOLDING THAT THE DISTRICT COURT CORRECTLY EXERCISED *IN PERSONAM* JURISDICTION OVER PETITIONERS IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

#### A. Review of this issue would be premature and would not resolve important questions of federal law.

This Court should refuse to review the Sixth Circuit's implicit holding that the district court properly exercised *in personam* jurisdiction over petitioners. Review of this issue is premature, as the proceedings on remand may reveal additional facts relevant to the determination of personal jurisdiction. *Carden v. Arkoma Associates,* 494 U.S. 185, 197, 110 S.Ct. 1015 (1990). Furthermore, the unique factual circumstances of this litigation render it unsuitable for review, as any rules of law established will be so fact-specific that they will not be of general public importance. *See* S.Ct.R. 10.1.

#### B. The Sixth Circuit's holding is in keeping with established law.

Most importantly, the Sixth Circuit's holding does not conflict with the holdings of this Court or any other court of appeals. The law on personal jurisdiction is well-developed and unambiguous. There are three means through which a court may obtain jurisdiction over a person: that person's presence in the forum state; the existence of "minimum contacts" between the person and the forum state; or the person's consent to submit to the jurisdiction of the court. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945). Where personal jurisdiction is premised upon "minimum contacts" between the person and the forum state, those contacts must be such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316.

Where a class action is involved, a court may obtain jurisdiction over non-resident plaintiffs lacking minimum contacts with the forum state through Fed.R.Civ.P. 23's notice and opt-out provisions. *Phillips Petroleum v. Shutts,* 472 U.S. 797, 811, 105 S.Ct. 2965 (1985). By providing an absent plaintiff with notice of the class action and the opportunity to opt-out of the proceedings, a court in effect invites an absent plaintiff to consent to the court's jurisdiction. If a properly notified plaintiff elects not to opt-out of the proceedings, that plaintiff will be bound by the final judgment. *Id.* at 808. This Court has held that such a means of obtaining jurisdiction over, and binding, an absent plaintiff satisfies the constitutional requirement of procedural due process. *Id.* at 812.

**1. *Petitioners consented to be subject to the jurisdiction of the district court.***

There is no question that petitioners voluntarily submitted to the jurisdiction of the district court. Petitioners were informed, by notice dated March 22, 1991, of the pendency of the class action on their contract claims, and their right to opt-out of the proceedings. (*See* Appendix F to petitioners' petition). Petitioners elected not to opt-out, and as such consented to be parties to the class action and to submit to the court's jurisdiction. Petitioners participated in the bench trial on those claims. Pursuant to the class action resolution of their contract claims, petitioners obtained a judgment of $6.7 million. Petitioners do not object to being bound by this judgment, and do not dispute the court's jurisdiction over them for those claims on which petitioners have been victorious. Rather, petitioners object to the court's exercise of jurisdiction over them on those remaining securities and fraud claims which were decided unfavorably to petitioners.[5]

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[5]The unfairness of petitioners' apparent attempt to have their cake and eat it, too was observed by the district court:

> As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $6.7 million judgment from SSG, of which they are the recipients as members of the plaintiff contract case, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues of the case.

Opinion and Order, Appendix B to petitioners' petition, at 21b.

Petitioners hinge their argument on the fact that, when the district court attempted to work a global settlement of the securities and fraud claims, and to that end conditionally certified a settlement class, certain of the petitioners elected to opt-out of the settlement class. As it turned out, the attempt at global settlement failed, and the district court ultimately dismissed all remaining claims on summary judgment. Petitioners, not pleased with this result, now argue that, by opting out of the proposed settlement class, petitioners were somehow able to divest this court of the *in personam* jurisdiction which it had already obtained over petitioners by way of their willing inclusion in the previously certified contract class.

Petitioners also argue that, as a class was never formally certified with respect to the securities and fraud claims, the court lacked personal jurisdiction over them with respect to those claims, and they are therefore not bound by the court's grant of summary judgment against petitioners on those claims. Petitioners' continued protestations that they were not members of a class with respect to the fraud and securities claims are red herrings. Although the class action mechanism is a means through which a court may obtain personal jurisdiction over plaintiffs lacking minimum contact with the forum, and thereby bind absent parties, **the district court did not rely on the failed settlement class action to obtain jurisdiction over petitioners, nor to bind them to the results of the judgment.**[6] The district court obtained

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[6]Although the district court did not rely on the class action mechanism to bind the petitioners with respect to their fraud and securities claims, a colorable argument can be made that it would have been proper to do so. The district court found that all parties tacitly agreed to try these issues as a class. In fact, in March, 1991 the named plaintiffs moved to certify such a class, and the district court explains that that motion "was not denied by me. In hearings resolving these issues in June and July of 1992, no party raised the need to again certify a class." (Opinion and Order, Appendix B to petitioners' petition, at 11b). Where a class is never formally certified, non-parties may nevertheless be bound by the final judgment if the case is "treated" by those involved as a class action. *See, e.g., Jackson v. Hayakawa,* 605 F.2d 1121 (1979), *cert denied,* 445 U.S. 952 (1980).

personal jurisdiction over petitioners when they consented to become members of the contract class, which class was properly certified. Petitioners are bound by the judgment dismissing their fraud and securities claims not because they were putative members of any failed settlement class, but because they were virtually represented by the named plaintiffs.

**2. *The district court obtained* in personam *jurisdiction over petitioners with respect to all of their claims when they voluntarily became parties to the contract class action.***

Petitioners have cited no authority to the effect that they can, at will, limit a court's exercise of personal jurisdiction over them to the claims which petitioners feel it is most advantageous for them to have tried in that forum. Allowing petitioners to thusly divide their claims up between courts would encourage forum shopping in the extreme.

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Despite the overwhelming evidence that all involved — parties, counsel and court — tacitly agreed to try the fraud and securities claims as a class action to which petitioners were parties, petitioners claim, nevertheless, that "The district court *never* notified Petitioners that their claims against Merrill Lynch would be adjudicated." (Petitioners' Petition, at 20). This is patently untrue: the district court sent the petitioners a notice of proposed settlement and conditional class action certification which clearly explained that:

> If the Settlement is not approved, the conditional certification is void ***and the case will proceed in Court*** as if there had been no settlement proposal or conditional certification. If you exclude yourself from the Settlement and are a member of the Class certified in March, 1991, your case will continue before this Court.

*See* Notice of Proposed Settlement and Conditional Class Action Certification, Appendix G to petitioners' petition, at 5g) (emphasis added).

Petitioners have quoted out of context the court's language that "you will have to retain your attorney and file your own suit, at your own expense." (*Id.* at 14g). That language was included in a discussion of what would happen to opt-outs of the settlement class *if the settlement was approved.* The notice was clear that, if the settlement fell through, even opt-outs of the settlement class would remain before the court on their fraud and securities claims. (*Id.* at 5g).

The law is clear that, once a party has submitted to the jurisdiction of the court for one claim, that court has jurisdiction over the party with respect to all claims. The petitioners' submission to the jurisdiction of the court with respect to their contract claims, and their litigation of those claims before that court, comprise sufficient "minimum contacts" with the forum state that the court's exercise of jurisdiction with respect to petitioners' other claims "does not offend traditional notions of fair play and substantial justice." *International Shoe,* at 316. As this Court has held, the requirements of due process are satisfied when a party purposefully avails itself of the privileges of conducting activities within the forum state such that it would reasonably expect to be haled into court there. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1979); *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

For example, in *Adam v. Saenger,* 303 U.S. 59 (1930), this Court held:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

*Id.* at 67-68.

This issue was addressed more recently in *Huff v. Pharr,* 748 F.2d 1553 (11th Cir. 1984), wherein the Eleventh Circuit upheld a California state court's exercise of jurisdiction over a defendant solely based on the defendant's involvement, many years earlier, in related litigation before that court. In that case, defendant was a Florida resident who was sued in 1972 in California state court. At the time of the 1972 suit, defendant possessed sufficient minimum contacts with the state of California to support *in personam* jurisdiction. Defendant fully litigated the matter, including a counterclaim against plaintiff and an appeal of an

adverse judgment to a higher state court. Ultimately defendant lost the case and judgment was entered against him, but defendant failed to pay that judgment. In 1982, plaintiff returned to the California state court and sued to renew the earlier judgment, and upon defendant's failure to defend a new final judgment was entered against him.

The Eleventh Circuit upheld the California court's exercise of jurisdiction over the defendant in the suit to renew the judgment, despite the fact that the defendant had not had any contacts with the forum state since the last suit. The Eleventh Circuit held that, as the defendant had "purposefully availed himself of the privilege of litigating in California's state courts by filing a counterclaim in [the earlier] action and appealing the adverse judgment," and as the defendant had previously been subject to the jurisdiction of the California court, it was not unfair to require the defendant to submit to the court's jurisdiction in the later suit. *Id.* at 1555. *See also General Contracting & Trading v. Interpole,* 940 F.2d 20 (1st Cir. 1991); *Irving Trust Co. v. Nationwide Leisure Corp.,* 562 F.Supp. 960, 961 (S.D.N.Y. 1982); *Dewey v. Almy Chemical Co.,* 25 F.Supp. 1021, 1022 (E.D.N.Y. 1939).

The rationale of *Adam* and *Huff* supports the conclusion that the district court in the instant case properly excercised jurisdiction over the petitioners with respect to their fraud and securities claims. Once the petitioners had consented to the jurisdiction of the court on the contract issues, the court then had jurisdiction to decide all of petitioners' related claims before it. Having consented to participate in the class action, the petitioners could not escape the court's jurisdiction to decide the remaining claims any more than if they had accepted service of process in the state. Furthermore, petitioners' wholehearted participation in the litigation of the contract issues provided sufficient minimum contacts between them and the forum state for the court to excercise *in personam* jurisdiction over petitioners regarding the remainder of their claims.

3. ***The district court had jurisdiction over petitioners with respect to their fraud and securities claims because petitioners acted as if they were parties and impliedly consented to the court's exercise of jurisdiction.***

A second reason the district court was justified in exercising jurisdiction over petitioners with respect to their fraud and securities claims is that petitioners' impliedly consented to letting the district court decide these claims. In other words, the district court had personal jurisdiction over petitioners independent of their inclusion in the contract class. As the district court explained:

> As stated hereinbefore, when settlement failed, I decided the remaining matters before me such as the contentions of the parties regarding the breach of contract claim and motions for summary judgment on, or dismissal of, plaintiffs' fraud claims. ***At no point did plaintiffs' counsel claim that the rulings to be made by me on those matters would only bind the named plaintiffs. All parties in the several hearings proceeded on the basis that my decisions would bind all investors.***

(*See* Opinion and Order, Appendix B to petitioners' petition, at 9b) (footnote omitted) (emphasis added).

Petitioners actively and willingly participated in the litigation of the securities and fraud claims. Papers were filed on their behalf, presumably with their consent[7], and when motions were argued, it was, as the district court found, "clear[ly] . . . on behalf of all investors." (*Id.* at 10b). Such participation in the litigation

[7]*See* Plaintiffs' Memorandum of Law in Support of Their Motion to Enjoin Merrill Lynch's Unilateral Solicitation of Settlements With Investors, dated October 1, 1992, at 3-4. In this motion, counsel for the class asked the district court to enjoin Merrill Lynch and the RTC from settling claims with any individual Unit Owners.

of an issue creates the presumption of consent to the court's jurisdiction:

> [A] party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum.

*In re Real Estate Title and Settlement Serv. Antitrust Lit.*, 869 F.2d 760, 771 (3d Cir. 1989), *cert denied*, 493 U.S. 959 (1989); *see also Irving Trust Co. v. Nationwide Leisure Corp.*, 562 F.Supp. 960, 961 (S.D.N.Y. 1982) ("The fact remains that Capitol 'has acted like a party on each occasion that it was strategically useful to act like a party and it has never sought to be dismissed as a party.'") .

Furthermore, petitioners fully expected that the court's decision would be dispositive of their fraud and securities claims. In the foreclosure proceedings taking place in Florida, petitioner Dykes, among others, argued that those actions should be stayed pending the outcome of the Michigan proceedings, as the Michigan action would conclusively resolve issues implicated in the foreclosures. (*See* Defendant's Response to Plaintiff's Motion to Sever and Stay Affirmative Defenses and Counterclaim and Supporting Memorandum of Law, Appendix hereto.) As described *supra,* the Florida Court of Appeal agreed with that position. Obviously, petitioners at that time presumed that the district court had jurisdiction to decide their claims. It was not until those claims were unfavorably resolved that petitioners decided they no longer wanted the court to exercise jurisdiction over them. Unfortunately for petitioners, at that point it was too late to make that decision.

As is clear from the above discussion, the district court was justified in exercising personal jurisdiction over petitioners with respect to their fraud and securities claims as: (1) petitioners consented to the court's jurisdiction for all claims in the case by

not opting-out of the contract class action; (2) assuming petitioners *could* limit their consent to the court's jurisdiction to the contract claims, petitioners' participation in the contract class action provided "minimum contacts" with the forum justifying the court's exercise of jurisdiction over petitioners' fraud and securities claims; and (3) petitioners participated in the litigation of the fraud and securities claims, and impliedly acted as if they were members of a class on those issues, thereby consenting to the court's jurisdiction regarding those claims.

## II.

## THE SIXTH CIRCUIT'S HOLDING THAT THERE WERE INDICIA THAT PETITIONERS WERE VIRTUALLY REPRESENTED BY THE NAMED PLAINTIFFS WITH RESPECT TO THEIR FRAUD AND SECURITIES CLAIMS IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

### A. Review of this issue would be premature, and would not resolve important questions of federal law.

Petitioners challenge the Sixth Circuit's holdings regarding virtual representation on two grounds. First, they argue that the Sixth Circuit incorrectly held that the doctrine of virtual representation is a substitute for *in personam* jurisdiction. Second, they argue that non-parties cannot be bound by a judgment under a theory of virtual representation where those non-parties are ascertained, identified individuals. These issues are not appropriate for review as the factual record is not fully developed enough to warrant review at this time. Furthermore, the unique facts of this case render it a poor candidate for review, as the issues involved are not of general public importance.

**B. The Sixth Circuit did not deviate from accepted precedent or violate petitioners' constitutional right to due process.**

***1. The Sixth Circuit did not hold that virtual representation is a substitute for personal jurisdiction.***

Contrary to petitioners' assertions, the Sixth Circuit did not hold that virtual representation is a substitute for personal jurisdiction. Rather, the Sixth Circuit held that, even though petitioners had not been afforded a formal opportunity to opt-out of the district court's proceedings with respect to the fraud and securities claims, petitioners were nevertheless bound by the result because of their virtual representation by the named plaintiffs. However, the mere fact that petitioners were not afforded a formal opportunity to opt-out with respect to the fraud and securities claims does not mean that the district court did not obtain personal jurisdiction over petitioners through other means. As was previously discussed, petitioners were invited to opt-out of the case early in the litigation, and elected instead to submit to the district court's jurisdiction. That having been established, it was not necessary for the district court to *again* obtain jurisdiction over petitioners for the remainder of the issues in the case. Although the Sixth Circuit did not expressly address this issue, it is clear that it did not hold that the district court could invoke the doctrine of virtual representation as a substitute for *in personam* jurisdiction.

***2. The Sixth Circuit correctly enunciated the test for virtual representation, and correctly held that the factual developments to date suggested that petitioners may be barred from pursuing their fraud and securities claims under that doctrine.***

Petitioners have argued that it is inappropriate to invoke the doctrine of virtual representation where the non-parties sought to be bound are identified, ascertained individuals. In support of this proposition, petitioners argue that the doctrine originated in the area of wills and estates to prevent unknown, unascertained or unborn persons from disturbing final judgments through assertion

of future interests. Whatever the genesis of the doctrine may have been, there is no doubt that it has evolved a long way since the 1915 case which petitioners cite to support their contention that the doctrine "will not be applied where the representation relied on does not appear to have been . . . necessary." *Pugh v. Frierson*, 221 F. 513, 524 (6th Cir. 1915).

As the Sixth Circuit correctly noted in the instant case, the doctrine of virtual representation is a means whereby a non-party may be bound by a judgment under a theory of res judicata or collateral estoppel. *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84 (5th Cir. 1977). The Sixth Circuit held that a non-party may be bound by a judgment "'in special circumstances that make relitigation especially unattractive. . . . Close nonlitigating relationships with a party, participation, apparent acquiescence, and perhaps deliberate maneuvering to avoid the effects of the first action are among the factors to be weighed.'" (Sixth Circuit opinion, Appendix A to petitioners' petition, at 31a, *citing* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §4457 (1981)).

The authority on point reveals that the Sixth Circuit correctly enunciated this test, and that the modern doctrine of virtual representation (as opposed to the infant doctrine which related to wills and estates) does not require any inability to identify or ascertain the non-parties. For example, in *General Foods Corp. v. Massachusetts Department of Public Health,* 648 F.2d 784 (1st Cir. 1981), General Foods was barred by the doctrine of res judicata from challenging the constitutionality of defendant's regulations, as those regulations had been held constitutional in an earlier suit to which General Foods had not been a party. However, plaintiffs in the earlier suit were two trade associations of which General Foods was a member, and General Foods helped fund that suit. In holding that General Foods was bound by the judgment in the first suit, the First Circuit held:

> [A] non-party [may not be] bound by an *in personam* judgment unless in the underlying litigation he had directly or vicariously a full and fair opportunity to

> present evidence and argument. . . . [A] person who is not a party to an action but who expressly or impliedly gives a party authority to represent him may be bound by the rule of res judicata as though he were a party. . . . [T]he person so represented has had a vicarious opportunity to be heard in the underlying litigation.
>
> In the instant case we need not consider whether merely by becoming a member of the two trade associations . . . General Foods impliedly invested each of them with authority to bring on behalf of its members litigation. . . . ***Here more is involved than the mere membership in a trade association. General Foods, at the request of [the Association] contributed $2,500 toward the expenses of the . . . litigation in the Massachusetts courts . . . [A] member of a trade association who finances an action which it brings on behalf of its members impliedly authorizes the trade association to represent him in that action.*** It is of no significance if a member declines to intervene in the litigation in his own name.

*Id.* at 787-778 (emphasis added).

As can be seen from the holding in *General Foods,* the inability to identify or ascertain non-parties is not a prerequisite to the application of the doctrine of virtual representation. To the contrary, the fact that the petitioners are easily identified militates toward the invocation of the doctrine, as the ease with which they can be identified stems from their active participation in, and manipulation of, the litigation from behind-the-scenes.

The facts developed to date suggest that this is a paradigm case for application of the doctrine of virtual representation. Petitioners are members of the AUO, which was actively involved in selecting class counsel and financing prosecution of the class action. As part of the strategy to resolve their disputes with defendants, the AUO persuaded a substantial number of its members, including many of the petitioners, to withhold the

mortgage payments on their condominium units. In this regard, petitioners clearly engaged in "deliberate maneuvering to avoid the effects of the first action", which was enunciated by the Sixth Circuit as a basis for finding virtual representation. Petitioners' co-counsel, on behalf of a number of his clients, sought and achieved a stay of foreclosure by arguing this action would resolve, under the doctrine of res judicata, the defenses they had raised to enforcement of their mortgage loans. Equity and principles of judicial economy now fully support holding petitioners' counsel to his word and applying the bar of virtual representation.

Based on petitioners' involvement as parties in the bench trial on the contract claims, and their behind-the-scenes manipulation of the litigation concerning the fraud and securities claims, the Sixth Circuit was justified in holding that further factual inquiry into the issue of virtual representation is warranted.

## III.

## THE SIXTH CIRCUIT'S FAILURE TO HOLD THAT THE DISTRICT COURT COULD NOT ISSUE AN INJUNCTION UNDER THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

### A. Review of this issue would be premature, and would not resolve important questions of federal law.

The injunction issued by the district court pursuant to the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, was vacated by the Sixth Circuit, as the Sixth Circuit held that the injunction could only issue should the remand proceedings reveal that petitioners were virtually represented in the district court litigation. Until the remand proceedings are concluded, review of this issue is premature, as the district court may determine that no virtual representation existed and may refuse to reissue the injunction, in which case petitioners' petition will be mooted. Furthermore, facts may be revealed on remand which

would bear on the propriety of the injunction, rendering review at this time premature.

**B. The Sixth Circuit did not hold that the Anti-Injunction Act excuses the requirement that a court must have personal jurisdiction over the person that it seeks to enjoin, and therefore its holding is in keeping with established law.**

Petitioners maintain that the Sixth Circuit implicitly held that, pursuant to the Anti-Injunction Act, a court may enjoin a person over which it does not have jurisdiction. However, this is clearly not the Sixth Circuit's holding. As is discussed *supra*, the district court clearly had *in personam* jurisdiction over petitioners. As such, the Sixth Circuit's failure to prohibit the district court from reissuing the injunction was not based on the reasoning that personal jurisdiction was not a necessary prerequisite to such an injunction.

Petitioners cite *Carlough v. Amchem Products*, 10 F.3d 189 (3d Cir. 1993) in support of their contention that the Sixth Circuit's holding was somehow erroneous. However, the Sixth Circuit's holding was entirely in keeping with *Carlough*. In that case, a class action was filed on behalf of persons exposed to certain asbestos-containing products manufactured by defendants. The court conditionally certified the class, but before notice was sent to putative plaintiffs regarding the pendency of the class action and of their right to opt-out, the district court issued a preliminary injunction under the relitigation exception to the Anti-Injunction Act, prohibiting a group of out-of-state individuals from pursuing duplicative actions. On appeal, the Third Circuit held that the district court was not authorized to enjoin the state court damages suit because it lacked personal jurisdiction over the absent plaintiffs:

> [The absent] plaintiffs had not received notice of the [class action] proceedings prior to the motions to enjoin their state court actions. Although an inference of consent might have been drawn from silence or inaction

> after notice and the running of the opt out period, we find no precedent for assuming consent prior to notice and the commencement of the opt out period. ***Thus, with neither express nor inferred consent, nor minimum contacts, and prior to notice and the commencement of the opt out period, the district court did not have personal jurisdiction over the [absent] plaintiffs and did not have authority to bind their actions when it issued the injunction. In short, the district court's pre-notice, pre-opt out period injunction was premature.***

*Id.* at 200 (citations and footnote omitted) (emphasis added).

It is clear that the facts of *Carlough* are easily distinguishable from the instant case. In *Carlough*, the district court attempted to issue an injunction prior to obtaining jurisdiction over the absent plaintiffs. However, had the court waited until after the notice had been sent, and after the opt-out period had run, the issuance of the injunction would have been upheld. "[O]nce the district court approved the dissemination of notice and commenced the opt out period . . . the jurisdictional problem was resolved." *Id.* at 201. Therefore, the Sixth Circuit's holding in the instant case is entirely in keeping with the holding in *Carlough:* as the district court in the instant case had obtained jurisdiction over petitioners far in advance of the issuance of the injunction, there was no violation of petitioners' due process rights.[8]

---

[8]In re *Real Estate Title and Settlement Services Litigation,* 869 F.2d 760 (3d Cir. 1989), which petitioners also cite, can be similarly distinguished.

## CONCLUSION

The Sixth Circuit's holdings are not appropriate for review by this Court. Until the proceedings on remand have been concluded, and the record thereby sufficiently developed, review of these issues would be premature. Furthermore, the Sixth Circuit's holdings do not conflict with well-established precedent, nor do they implicate important questions of federal law. Accordingly, respondent respectfully requests that this Court deny petitioners' petition.

Respectfully submitted,

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No. 94-1968

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

J. DON ADAMS, et al.,
*Petitioners,*

RICHARD C. BECHERER, et al.,
*Plaintiffs/Respondents,*

*v.*

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
*Defendants/Respondents.*

## APPENDIX

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA CIVIL DIVISION

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION, N/K/A TRUSTBANK SAVINGS, F.S.B.,

*Plaintiff,*

*v*

DICK DYKES, et al.,

*Defendants.*

Case No. 89-2467 (CA-01)

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO SEVER AND STAY AFFIRMATIVE DEFENSES AND COUNTERCLAIM AND SUPPORTING MEMORANDUM OF LAW**

Dominion Federal Savings & Loan Association n/k/a TrustBank Savings, F.S.B. ("TrustBank") has filed a Motion to Sever and Stay Affirmative Defenses and Counterclaim (the "Motion to Sever and Stay") as raised by Dick Dykes (the "Defendant"). The Motion to Sever the Affirmative Defenses of the Defendant must be denied in that the issues raised by the Defendant are inextricably linked to the question of TrustBank's claim of ownership of any note or mortgage and its right to foreclose any such mortgage which purportedly encumbers real property owned by the Defendant. The Defendant does not object to the severance of the Counterclaim in that the Counterclaim was brought by the Defendant as a compulsory counterclaim as required by Rule 1.170(a), Fla.R.Civ.P., and in order avoid its falling outside of applicable limitation periods.

However, Defendant vigorously objects to the severance of its Affirmative Defenses. Such a severance would in essence preclude Defendant from denying the validity of the note and mortgage purportedly held by TrustBank and would impermissibly shift the burden currently imposed on TrustBank of proving its right to foreclose its purported mortgage. Assuming that TrustBank carries its burden of proof in establishing its right to foreclose the note and mortgage which it purportedly holds, the Defendant must then have the right to challenge the validity of that note and mortgage through affirmative, equitable and other defenses. Severing the Affirmative Defenses would preclude the Defendant from so defending, and such a result would be improper.

In its Motion to Stay, TrustBank has represented to this Court that the validity of the note and mortgage (together with the delivery of those documents) may be appropriately determined by the United States District Court in and for the Eastern District of Michigan. Defendant agrees with this position, and accordingly does not object to a stay of all proceedings arising out of this lawsuit. A stay should only be granted regarding all issues because the disposition of the proceeding in the United States District Court in and for the Eastern District of Michigan will have a *res judicata* effect on some issues in this case, and because a stay of less than all issues would deprive the Defendant of his right to trial by jury regarding the issues raised in his counterclaim.

## STATEMENT OF FACTS

The abridged version of facts presented by TrustBank in its Motion to Sever and Stay are both disingenuous and insufficient to allow this Court to grant that motion. In addition, the Motion to Sever and Stay contains several material misstatements regarding the allegations made by the Defendant in his Affirmative Defenses and Counterclaim.

Beginning in 1984, Merrill Lynch Pierce Fenner & Smith Inc. collaborated with a number of other promoters (including TrustBank) to market, build, finance, own and operate a 474-unit luxury hotel condominium in Naples, Florida, ultimately known as "The Registry Hotel at Pelican Bay" (the "Hotel"). The factual details regarding this business transaction are set forth in the Complaint attached to the Motion to Sever and Stay with the caption *Richard C. Becherer, et al v Merrill Lynch Pierce Fenner & Smith Inc. et al* which was filed in the United States District Court in and for the Eastern District of Michigan — Southern Division (the "Class Action Lawsuit").

Sometime during 1984, the Defendant executed (but did not deliver to TrustBank) a series of documents (the "Documents"), wherein he agreed to purchase a condominium unit in the Hotel (the "Hotel Unit") upon its completion and its being ready for occupancy as such, but no later than the outside time limit established by the Federal Land Sales Full Disclosure Act and other applicable legislation. In the Documents, the Defendant made application to TrustBank for a mortgage loan to be secured by the Hotel Unit and his percentage of the commercial and common areas.

As alleged in the Affirmative Defenses, the Documents further provided that all subscription documents would be canceled, null and void in the event that TrustBank did not notify the Defendant in writing of its acceptance of his application within sixty (60) days of its submission. This subscription period purportedly terminated on October 31, 1984, and as of the date of this pleading, TrustBank has never provided its written acceptance of the loan application of the Defendant. The Defendant has alleged that the failure to provide this information automatically resulted in a cancellation of his agreement to purchase the Hotel Unit pursuant to the terms of the Documents executed by him.

As a further condition precedent to the obligation of the Defendant to purchase the Hotel Unit at such time as it was completed, the Hotel Unit at such time as it was completed, the Hotel was (as outlined in the Offering Memorandum) to be

completed on or prior to the second anniversary date of the execution of the Documents. Upon completion, the Hotel was to be capable of being occupied and fully operational for its intended purpose as a resort hotel facility. The Affirmative Defenses allege that the Hotel was not complete as of that date, and that this second condition precedent to the Defendant's obligation to purchase a Hotel Unit had not occurred or been satisfied within any applicable two-year period. Notwithstanding the failure of these two express conditions precedent, a purported "closing" was scheduled by TrustBank (without appropriate notice to or consent of the Defendant). Subsequent to the "closing," the Defendant was supplied with documents and representations from TrustBank stating that all conditions precedent had been satisfied or had occurred, and that the closing had taken place in accordance with the Documents and the Offering Memorandum.

A critical issue with respect to the Motion to Sever and Stay pertains to the very existence and validity of the note and mortgage purportedly sought to be foreclosed by TrustBank and the accompanying promissory note. These mortgage documents were previously executed and placed in escrow by the Defendant in 1984, but were never delivered to TrustBank. Instead, they were forwarded to an escrow agent to be delivered to TrustBank *only in accordance with the terms of the Documents and the Offering Memorandum*, subject to the satisfaction of all conditions precedent. The Defendant alleges in his Affirmative Defenses that the conditions precedent in the Offering Memorandum had not occurred, had not been performed, or otherwise had not been satisfied. As a result of the escrowed documents being wrongfully withdrawn in breach of fiduciary or other duties, no effective delivery was made to TrustBank and TrustBank holds no valid or enforceable mortgage on property owned by the Defendant which it now seeks to foreclose.

## MEMORANDUM OF LAW

## IT IS IMPROPER TO SEVER THE AFFIRMATIVE DEFENSES OF THE DEFENDANT IN THAT THE ISSUES RAISED BY HIM ARE INEXTRICABLY LINKED TO THE QUESTION OF TRUSTBANK'S RIGHT TO FORECLOSE ITS PURPORTED MORTGAGE

Contrary to the facts described by TrustBank in its Motion to Sever and Stay, the Defendant has alleged in his Affirmative Defenses specific wrongdoing by TrustBank in conjunction with the mortgage loan transaction between it and the Defendant. Further, and precisely to the point, the Defendant has alleged that TrustBank cannot carry its burden of proving its right to foreclose the mortgage it purportedly holds. The Defendant has also denied in his Answer to the Complaint to Foreclose Mortgage that TrustBank owns a valid, enforceable mortgage lien which it is entitled to foreclose. In denying these allegations, the Defendant affirmatively stated that

> ... The Note and Mortgage were inoperative instruments from their inception, continuing through the date of purported transfer to the Plaintiff [TrustBank]; it was therefore not possible for the Plaintiff [TrustBank] to acquire title thereto, all as more particularly described in the Affirmative Defenses and Counterclaim contained herein.

Paragraph 4 of Defendant's Answer to Complaint to Foreclose Mortgage.

There are ten affirmative defenses which have been raised by the Defendant to TrustBank's Complaint to Foreclose Mortgage. Of these ten defenses, four directly challenge TrustBank's right to bring this foreclosure action. The balance of the defenses allege that fraud permeated the mortgage loan transaction and that, as result, TrustBank is or should be equitably precluded from foreclosing its purported mortgage.

TrustBank relies heavily on the provisions of *Fla. Stat* §702.01 (1988). The current version of this statute was enacted

with an effective date of October 1988, and there are no cases reported after its enactment. It appears to be a codification of prior law which has zealously sought to preserve the constitutional right to trial by jury by mortgagors defending a foreclosure proceeding brought by mortgagees wherein a compulsory counterclaim is required to be raised. *E.g., American National Bank of Jacksonville v Norris,* 368 So.2d 897 (Fla. 1st D.C.A. 1979) (jury decided merits of counterclaim filed by mortgagor against mortgagee alleging breach of a construction loan agreement).

*American National Bank of Jacksonville, supra,* and the other cases relied upon by TrustBank in its argument do not provide support for TrustBank's position regarding severance of the Affirmative Defenses (although severance of the Counterclaim is appropriate). Rather, these cases uniformly hold that severance of claims which contain issues common to both claims (such as the Affirmative Defenses) should *not* be permitted while unrelated claims (such as the Counterclaim) may be severed. The issues raised by the Defendant in his Affirmative Defenses are common to those raised by TrustBank in its Complaint to Foreclose Mortgage, i.e., the validity and enforceability of the mortgage. Indeed, the Defendant's allegations go to the heart of TrustBank's right to foreclose the mortgage it purportedly owns.

In providing that all mortgages shall be foreclosed in equity, the Florida Legislature in *Fla. Stat.* §702.01 intended to continue the traditional rules of law with regard to the discretion of a trial court sitting in equity, including the enforcement of the traditional equitable notion that one who seeks equity must do equity. Sitting as a court in equity, this Court has the discretion to refuse to grant a prayer for foreclosure of a mortgage if doing so would be inequitable. *Creamer v Aultman,* 445 So.2d 382 (Fla. 1st D.C.A. 1984). A traditional reason for not allowing a mortgagee to foreclose a mortgage exists when the mortgagor alleges fraud or collusion as a defense to a mortgage foreclosure suit. *Ruff v Guaranty Title and Trust Co.,* 126 So. 383 (Fla. 1930).

In this case, the severance of the claims held by TrustBank and the Affirmative Defenses of the Defendant would not only

result in litigating common issues on multiple occasions (ignoring the collateral estoppel and *res judicata* impact of severance, as discussed below), but severance would also work an extreme hardship on the Defendant. For reasons beyond his control, the Defendant holds legal title to the Hotel Unit, has suffered out of pocket damages and has incurred other fees and costs while attempting to unravel this problem. The foregoing were not incurred in ratification of an unauthorized "closing," but were incurred in order to protect the Defendant pending the determination of the rights and responsibilities of all parties.

In any event, the issue of legal title is irrelevant at this point in the these proceedings. The only issue before this Court (excluding those issues raised in the Counterclaim) is whether TrustBank can establish its right to foreclose the purported mortgage which it claims to hold. In making this determination, the Defendant must be able to effectively defend against any claims of validity and enforceability, including the ability to allege and prove the Affirmative Defenses. Thus, the Defendant consents to the severance of the Counterclaim, but respectfully requests this Court to deny the request of TrustBank to sever the Defendant's Affirmative Defenses.[1]

---

[1]TrustBank relies on *Adams v Citizens Bank of Brevard,* 248 So.2d 682 (Fl. 4th D.C.A. 1971) as providing authority that the Counterclaim and Affirmative Defenses of the Defendants should be severed and that the nonjury foreclosure trial should proceed prior to the jury trial. This reliance is misplaced, in that the Court in that case held that the trial court could determine nonjury only "... those factual issues which were unrelated to the issues upon which counterclaimants were entitled to jury trial." *Adams, supra* at 685. Thus, even if severance is granted with respect to the Counterclaim alone or both the Counterclaim and the Affirmative Defenses, TrustBank's foreclosure proceeding would have to be stayed pending determination and resolution by jury of those issues upon which Defendants are entitled to jury trial.

## ALL CLAIMS ARISING OUT OF THESE PROCEEDINGS SHOULD BE STAYED DURING THE PENDENCY OF THE CLASS ACTION LAWSUIT

The conclusion reached by TrustBank in its Motion to Sever and Stay (which is supported by judicial precedent) is correct in that this Court may, in the interest of state and federal comity, stay these proceedings until the Class Action Lawsuit is tried and decided. A stay is particularly appropriate where, as here, the outcome of the Class Action Lawsuit (in which TrustBank is a defendant) would have *res judicata* effect on the Counterclaim and Affirmative Defenses of the Defendant. The test for staying a cause of action pending simultaneously with another action instituted in a separate court is that the "... identity of the matters involved must be such that a judgment in the first suit could be pleaded in part as a former adjudication." *Horter v Commercial Bank & Trust*, 126 So. 909, 912 (Fla. 1930). Any judgment in the Class Action Lawsuit will act as an estoppel to TrustBank and the Defendant from litigating issues common to both causes of action which are actually litigated and decided in the prior action.

Moreover, allowing the foreclosure action to proceed in advance of the Class Action Lawsuit (or the Affirmative Defenses) would severally prejudice the Defendant in the Class Action Lawsuit. One form of relief which has been requested in the Class Action Lawsuit is rescission voiding the note and mortgage purportedly held by Trustbank. Presented with common issues as raised by TrustBank and the Defendant in their respective pleadings, the United States District Court for the Eastern District of Michigan has the authority, pursuant to the Securities Act of 1933, the Securities and Exchange Act of 1934 (as to which the federal courts have exclusive jurisdiction and this Court may not assume concurrent jurisdiction), the Federal Interstate Land Sales Full Disclosure Act and other applicable authority to take actions which can and will affect the validity of the note and mortgage pertaining to the Hotel Unit, as well as the notes and mortgages of many other hotel unit owners situated similarly to the Defendant.

Accordingly, if this Court is inclined to stay any of these proceedings, it must stay all of these proceedings. Only in that way can it protect all parties from the res judicata or collateral estoppel effect which resolution of the Class Action Lawsuit will provide. In addition, because the issues in both lawsuit are inextricably intertwined (as are the issues in the claims of Defendant and TrustBank in this case), the only way to preserve the Defendant's right to trial by jury is to stay the foreclosure proceeding pending resolution of both the Class Action Lawsuit and the claims raised by the Defendant in this suit as to which a jury trial is afforded as of right.

Finally, the anomaly painted by TrustBank regarding the Defendant's justification of seeking alternative relief is disingenuous. TrustBank suggests that the "... only way Defendants could seek to justify such a result would be the desire to await the outcome of their actions in Michigan — to see whether they are entitled to rescission of their unit purchase, note and mortgage — and then, if they lose, to take the opportunity to reinstate their mortgage." Motion to Sever and Stay at 6. This argument ignores that it is TrustBank and not the Defendant which has requested severance and stay of these proceedings.

Although this argument may initially have some appeal, on closer scrutiny it becomes obvious that it is a paper tiger. More importantly, this argument masks the fact that it is TrustBank, and not the Defendant, that seeks procedural advantage. By filing this action, TrustBank is attempting to avoid the Class Action Lawsuit in which it is a named party defendant. Even if TrustBank succeeds in this procedural jousting before this Court, it must still defend itself in the Class Action Lawsuit wherein all notes and mortgage purportedly held by it in connection with the Hotel may be voided. If the United States District Court, pursuant to its exclusive jurisdiction and the authority granted to it in the Securities and Exchange Act of 1934 (including Rule 10b-5 promulgated thereunder), determines that rescission is an appropriate remedy, that decision *will* affect the validity of the note and

mortgage in this action. Therefore, a complete stay is appropriate and should be granted by this Court.

## CONCLUSION

As a court in equity, this Court is required to sever equitable and legal claims in a foreclosure proceeding so long as those claims are not related, but are separate and independent. Therefore, it is appropriate to sever the Counterclaim, although it is within the discretion of this Court to refuse to do so in order to achieve greater judicial efficiency in the resolution of these issues. However, the claims raised by the Defendant in the Affirmative Defenses are so inextricably linked to the issues raised in TrustBank's Complaint that it is not appropriate for this Court to sever those claims.

TrustBank must prove its case. It must carry its burden of establishing the validity and enforceability of the note and mortgage it purportedly holds, and the Defendant must be given the opportunity to defend itself from TrustBank's allegations. While severance of the Affirmative Defenses would defeat the ability of the Defendant to defend itself, a stay of these proceedings would not prejudice TrustBank or the Defendant. A stay of all (but not some) of the proceedings in this case is appropriate and would properly accommodate the interests of comity, would allow the *res judicata* and collateral estoppel effect of the Class Action Lawsuit to benefit the appropriate parties at its conclusion and would benefit this Court through the more efficient administration of justice.

Finally, if any proceedings in this lawsuit are stayed, all proceedings must be stayed pending resolution of the legal claims raised in the Affirmative Defenses and Counterclaim of the Defendant in order to preserve his right to trial by jury on all issues so triable.

WHEREFORE, the Defendant respectfully requests this Court to deny the motion to sever his Affirmative Defenses, although he has no objection to severing the Counterclaim. In

addition, the Defendant respectfully requests this Court to stay the entire proceedings pending resolution of the Class Actin Lawsuit or, at a minimum, pending resolution by jury of the legal claims raised by the Defendant in his Affirmative Defenses and Counterclaim.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of this document has been filed with the Clerk of the Courts and a true and correct copy of the foregoing has been furnished by U.S. Mail this day of February, 1990 to Sherry Dickman, Esq., Penthouse, Atico Financial Center, 200 Southeast First Street, Miami, Florida 33131.

_____
Thomas R. Grady, Esq.

(3)

No. 94-1968

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1995

J. DON ADAMS, et al.,

*Petitioners,*

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit's order remanding this case to the District Court for an evidentiary hearing on virtual representation renders the case not yet ripe for review.

2. Whether the petitioners had sufficient minimum contacts with the District Court to allow its exercise of personal jurisdiction over them.

3. Whether the District Court, having personal jurisdiction over petitioners, could, under the traditional doctrines of *res judicata* and collateral estoppel, enjoin them from relitigating claims already decided.

4. Whether the District Court's March 24, 1992 Order regarding communications between petitioners and their counsel, which lapsed over three years ago upon the failure of the provisional class settlement, is moot.

5. Whether the District Court's March 24, 1992 Order permitting class counsel to communicate directly with petitioners and directing all counsel to impart "accurate, objective, balanced information" regarding the provisional settlement was a proper exercise of the District Court's powers under Fed. R. Civ. P. 23(d) to control the conduct of class actions.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 2

SUMMARY OF ARGUMENT ..... 8

REASONS TO DENY THE WRIT ..... 9

I. BECAUSE THE COURT OF APPEALS REMANDED THIS CASE TO THE DISTRICT COURT, THE CASE IS NOT RIPE FOR REVIEW ..... 9

II. PETITIONERS HAD SUFFICIENT MINIMUM CONTACTS WITH THE DISTRICT COURT TO ALLOW ITS EXERCISE OF PERSONAL JURISDICTION OVER THEM ..... 10

III. UNDER TRADITIONAL PRINCIPLES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL, THE DISTRICT COURT MAY PROPERLY ENJOIN PETITIONERS' STATE COURT PROCEEDINGS UNDER THE ANTI-INJUNCTION ACT UPON FINDING PETITIONERS IN PRIVITY WITH THE PARTIES BEFORE IT ..... 13

IV. BECAUSE THE DISTRICT COURT'S MARCH 24, 1992 ORDER LAPSED WHEN THE PROPOSED SETTLEMENT FAILED, QUESTIONS REGARDING THE ORDER'S CONSTITUTIONALITY ARE MOOT ..... 16

V. THE DISTRICT COURT'S MARCH 24, 1992 ORDER REPRESENTS A STANDARD EXERCISE OF THE DISTRICT COURT'S POWERS TO CONTROL CLASS ACTION LITIGATION ..... 16

CONCLUSION ..... 18

# TABLE OF AUTHORITIES

Page

## Federal Cases

*Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied sub nom. Metropolitan Dade County v. Aerojet-General Corp.*, 423 U.S. 1026 (1975) ..... 14

*Amalgamated Sugar Co. v. NL Industries, Inc.*, 667 F. Supp. 87 (S.D.N.Y. 1987) ..... 14

*Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 799 F. Supp. 755 (E.D. Mich. 1992) ..... 2

*Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 809 F. Supp. 1259 (E.D. Mich. 1992) ..... *passim*

*Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054 (6th Cir. 1995) ..... 5

*Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967) ..... 10

*Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103 (5th Cir. 1985) ..... 11

*Carlough v. Amchem Products*, 10 F.3d 189 (3rd Cir. 1993) ..... 12

*Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc.*, 25 F. Supp. 1021 (D.C.N.Y. 1939) ..... 13

*Finberg v. Sullivan*, 658 F.2d 93 (3d Cir. 1980) ..... 16

*Gerrard v. Larsen*, 517 F.2d 1127 (8th Cir. 1975) ..... 14

*Grammenos v. Lemos*, 457 F.2d 1067 (2d Cir. 1972) ..... 11

*Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994) ..... 11

*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) ..... 11

TABLE OF AUTHORITIES – Continued

Page

*NLRB v. Schnell Tool & Die Corp.*, 359 F.2d 39 (6th Cir. 1966) ..... 14

*In re Ocean Ranger Sinking Off Newfoundland*, 617 F. Supp. 435 (E.D. La. 1985) ..... 14

*In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied sub nom. Chicago Title Ins. Co. v. Tuscon Unified Sch. Dist.*, 493 U.S. 821 (1989) ..... 11

*Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992) *cert. denied*, 114 S. Ct. 1541 (1994) ..... 14

*Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678 (N.D. Tex. 1977), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) .... 14

*Super Tire Engineering Co. v. McCorkle*, 469 F.2d 911 (3d Cir. 1972), *rev'd on other grounds*, 416 U.S. 115 (1974) ..... 16

*Thompson v. Freeman*, 648 F.2d 1144 (8th Cir. 1981) .... 14

*Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990) ..... 11

*White v. National Football League*, 41 F.3d 402 (8th Cir. 1994) ..... 11

STATE CASES

*Dykes v. Trustbank Sav., F.S.B.*, 567 So.2d 958 (Fla. Ct. App. 2d Dist. 1990) ..... 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 2283 ..... 3, 10

Fed. R. Civ. P. 23(d) ..... 9, 17

MISCELLANEOUS

7B C. Wright, et al., *Federal Practice and Procedure* § 1794 (1986) ..... 17

18 C. Wright, et al., *Federal Practice and Procedure* § 4457 (1981 and Supp. 1995) ..... 15

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Shelter Seagate Corporation, Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Arni C. Thorsteinson and Graham C. Lount (collectively "Shelter Seagate"), submit this brief in opposition to petitioners' request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## STATEMENT OF THE CASE

### 1. Proceedings Before and Opinions of the District Court

Petitioners are members of a plaintiff class in an action brought pursuant to Fed. R. Civ. P. 23(b)(3) in August of 1989, in the United States District Court for the Eastern District of Michigan. The plaintiff class (sometimes referred to herein as "unit owners") sought damages for alleged securities and common law fraud, other torts, and breaches of contract in connection with the construction and sale of the Registry Resort Hotel, a 474-room luxury hotel in Naples, Florida.

On November 19, 1990, the District Court, prior to class certification, granted summary judgment for all defendants on one of three fraud claims alleged by plaintiffs and reserved ruling on the summary judgment motions relating to the two remaining fraud claims. *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 799 F. Supp. 755, 782-84 (E.D. Mich. 1992). Recognizing that plaintiffs' fraud claims arose out of contract claims, the District Court certified a class and ordered an expedited, bifurcated trial on the contract claims against only Shelter Seagate, the developer of the hotel. All of the petitioners participated as class members in the expedited contract trial.

After the certified class tried its contract claims against Shelter Seagate to the District Court, but before the Court's decision, the parties reached a provisional class settlement of all claims against all defendants. The District Court approved notice of the provisional settlement which was sent to each unit owner. Petitioners, who

had opted in for the contract trial against Shelter Seagate, opted out of the provisional settlement. The settlement failed when an excess number of unit owners opted out.

After the settlement failed, the District Court rendered its decision holding that Shelter Seagate breached its contract with the unit owners by leasing certain furniture, fixtures and equipment for the hotel. It awarded the class, which included all petitioners, judgment against Shelter Seagate for $6.7 million. The District Court then granted summary judgment in favor of all defendants dismissing all plaintiffs' remaining claims, including their fraud claims. *Id.*

After petitioners learned that they had lost before the District Court they served Merrill Lynch with a lawsuit they had earlier filed in Collier County, Florida, asserting the same claims that had been dismissed by the District Court. The District Court enjoined the relitigation in Florida, under the religitation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, holding that the injunction was necessary "to protect and effectuate its judgments." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith,* 809 F. Supp. 1259, 1271 (E.D. Mich. 1992).

Petitioners opposed the injunction, arguing that because all claims against all defendants were not certified as a class action, the District Court lacked personal jurisdiction over the petitioners necessary to enjoin them from relitigating their claims. The District Court rejected the petitioners' argument holding:

> Florida plaintiffs also argue that this court does not have personal jurisdiction over them because no class was ever certified for purposes

> of the Merrill Lynch fraud claims. . . . Counsel for Florida plaintiffs confuses the concept of personal jurisdiction with the res judicata issue. I have personal jurisdiction over the Florida plaintiffs because they are parties to the case before me through their representatives. They also are members of the class in the breach of contract trial which I conducted, and as such are bound by the results of that trial. For these reasons, I conclude that there is personal jurisdiction over them. As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $6.7 million judgment from Shelter Seagate, of which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

*Becherer*, 809 F. Supp. at 1270 (footnote omitted).

**2. The Decision on Appeal**

The Sixth Circuit affirmed the District Court's holding that it had personal jurisdiction over the petitioners without comment. The Court of Appeals held, however, that the District Court used an impermissibly broad definition of virtual representation, one of the elements it relied upon to find the petitioners in privity with the named plaintiffs. It vacated the injunction and remanded the case to the District Court to conduct an evidentiary hearing on whether *res judicata* and collateral estoppel would bar relitigation of the claims already decided by the District Court. The Court of Appeals stated that the

briefs submitted on appeal "demonstrate a strong possibility that this case may yet be an appropriate one for application of *res judicata* and collateral estoppel [if, as defendants contend, the petitioners,] through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the *Becherer* plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054, 1071 (6th Cir. 1995).

### 3. Petitioners Injected Themselves Into the District Court's Forum and Consented to the District Court's Exercise of Personal Jurisdiction.

In addition to consenting to the District Court's exercise of personal jurisdiction by actually trying their contract claims against Shelter Seagate before the District Court, petitioners acknowledged in several ways that they were subject to the District Court's personal jurisdiction.

#### a. The Interpleader

Before the District Court dismissed plaintiffs' claims, the Registry Hotel Corporation filed an interpleader action in the District Court against Shelter Seagate, the *Becherer* class representatives and all other unit owners similarly situated. The hotel's unit owners, including all petitioners, were organized in a formal organization called the Association of Unit Owners of the Registry Hotel ("AUO"). The AUO moved to intervene in the

interpleader action. The District Court allowed intervention and, in its opinion and order dated August 13, 1992, described the interpleader action as ancillary to the *Becherer* litigation.

**b. The Florida Foreclosure Actions**

While both the *Becherer* litigation and the interpleader action were pending before the District Court, Trustbank, which provided mortgage loans to unit owners to finance their investment in the Hotel, began foreclosure actions in Florida against a number of unit owners that refused to pay their mortgages. Those unit owners, many of whom are petitioners here, filed counterclaims in the Florida foreclosure proceedings nearly identical to the *Becherer* class action complaint. Thomas Grady, petitioners' counsel here, represents petitioners in those foreclosure actions. Class counsel appears as co-counsel with Grady in many of those actions.

The unit owners moved the Florida court for a stay of the foreclosure actions pending the District Court's decisions and orders in *Becherer* arguing in its brief that a stay was appropriate because "[a]ny judgment in the class action lawsuit will act as an estoppel to Trustbank *and the defendant* from litigating issues common to both causes of action which are actually litigated and decided in the prior action." The Florida Second District Court of Appeal stayed the Florida foreclosure actions pending the District Court's decision in *Becherer*. *Dykes v. Trustbank Sav., F.S.B.*, 567 So.2d 958 (Fla. Ct. App. 2d Dist. 1990).

### c. The Florida Action to Compel Arbitration with the AUO

In April of 1990, Shelter Seagate, in an effort to resolve a dispute with the AUO about management and agency fees to which it believed it was entitled, filed a notice of arbitration against the AUO with the American Arbitration Association. The AUO refused to arbitrate, forcing Shelter Seagate to file an action in Florida state court seeking to compel arbitration. On August 29, 1990, the AUO filed a motion to stay Shelter Seagate's efforts to compel arbitration pending the District Court's decision in *Becherer*. In its brief in support of its motion to stay the proceedings, the AUO asserted that the District Court in *Becherer* had personal jurisdiction over the individual unit owners and that the parties before the District Court in *Becherer* and the parties before the Florida court were identical. The AUO stated in its brief, "[a]lthough the AUO is not named in the class action, these actions involve the same parties." In further support of its motion for a stay, the AUO argued that a stay of the Florida action to compel arbitration was appropriate because the decision of the District Court in *Becherer* would be *res judicata* in the Florida action.

In addition to the AUO's intervention in the interpleader action and its request to the Florida state court that the motion to compel arbitration be stayed pending the outcome of *Becherer*, the AUO formally participated in *Becherer* by filing briefs and by negotiating for nine months with the defendants to achieve the provisional settlement of not only *Becherer* but also the interpleader action and the Florida action to compel arbitration.

**4. Proceedings Relating to the District Court's March 24, 1992 Order**

During the nine months of settlement negotiations, a rift developed between Elwood Simon, counsel for the class, who supported the settlement, and Thomas Grady, counsel for petitioners, who opposed the settlement. This dispute prompted Grady to instruct Simon not to communicate with petitioners. Grady also instructed counsel for the AUO not to communicate with petitioners.

Simon asked the District Court to intervene and the District Court held a hearing regarding appropriate communications between the unit owners' lawyers and the class. The Court then issued an order requiring all three lawyers "to impart only accurate, objective and balanced information *regarding the settlement* . . . . "

By the spring of 1992, the settlement was defeated and at that point, the settlement communication Order expired.

## SUMMARY OF ARGUMENT

A writ of certiorari should not issue because the case involves no important question of federal law and is not ripe for review. Petitioners seek this Court's review because they claim that the District Court departed from the accepted and usual course of judicial proceedings, and that the Court of Appeals sanctioned that departure. Both the determination of the jurisdictional basis a federal court requires to enjoin a state court proceeding and

the issuance of the March 24, 1992 Order, however, involved standard applications of law that do not warrant review by this Court. Moreover, the Court of Appeals vacated the injunction about which petitioners complain and remanded the case to the District Court for an evidentiary hearing on whether application of the doctrine of virtual representation will allow reissuance of an injunction to bar petitioners from relitigating claims already decided by the District Court.

The questions presented, moreover, are not appropriate for the exercise of this Court's jurisdiction because the rulings below do not conflict with the holdings of this Court or any other Circuit Court of Appeals and they are consistent with the application of existing law.

The District Court has personal jurisdiction over petitioners as petitioners have repeatedly injected themselves into the District Court's forum. Petitioners' challenge to the District Court's March 24, 1992 Order is moot because that Order lapsed almost three years ago. Moreover, the District Court properly issued its March 24, 1992 Order in accordance with its powers under Fed. R. Civ. P. 23(d) to control the proceedings of class actions.

## REASONS TO DENY THE WRIT

### I. BECAUSE THE COURT OF APPEALS REMANDED THIS CASE TO THE DISTRICT COURT, THE CASE IS NOT RIPE FOR REVIEW.

Petitioners seek this Court's review to overturn the Court of Appeals' decision vacating the District Court's

injunction and remanding the case for further factual findings. In effect, petitioners seek to prevent the District Court's reconsideration of its injunction enjoining petitioners from pursuing their claims in Florida state court. As such, the issue is not ripe for review by this Court. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.")

## II. PETITIONERS HAD SUFFICIENT MINIMUM CONTACTS WITH THE DISTRICT COURT TO ALLOW ITS EXERCISE OF PERSONAL JURISDICTION OVER THEM.

Petitioners misstate the jurisdictional basis upon which the District Court enjoined the Florida state court proceedings. Petitioners claim that the District Court did not have personal jurisdiction over them and so was without authority to enjoin the subsequent Florida state court action under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. This claim is incorrect because petitioners had already submitted themselves to the personal jurisdiction of the District Court when they participated as class members in a trial against Shelter Seagate; when they participated in an interpleader action ancillary to *Becherer*, and before the same District Court; when the AUO, an organization to which each petitioner belongs, formally and informally participated in *Becherer* by filing briefs; and when they participated for nine months in settlement negotiations.

Petitioners, by repeatedly seeking substantive relief from the District Court, have waived any objection to personal jurisdiction. A party can voluntarily or involuntarily waive its objections to personal jurisdiction. *See White v. National Football League*, 41 F.3d 402, 407 (8th Cir. 1994); *Trans World Airlines v. Mattox*, 897 F.2d 773, 786 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982) (stating that a party may legally submit to the jurisdiction, "whether voluntary or not"). Thus, "[i]f a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972), *quoted in Trans World Airlines*, 897 F.2d at 786, *and Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1108 (5th Cir. 1985); *see also In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 771 (3d Cir.) ("Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates . . . the underlying merits of the class action . . . . "), *cert. denied sub nom., Chicago Title Ins. Co. v. Tuscon Unified Sch. Dist.*, 493 U.S. 821 (1989).

Actions that a court will construe as a waiver of personal jurisdiction include active participation in discovery, filing of motions, participation in a trial, intervention into an action, and objection to a class settlement. *White*, 41 F.3d at 407-08; *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 n.5 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *Trans World Airlines*, 897 F.2d at 786-87. All of these actions are present here.

Petitioners actively participated in the litigation because they were part of the plaintiff class in an expedited trial of breach of contract claims against Shelter Seagate. The AUO intervened in the ancillary interpleader action before the District Court on behalf of all its members including petitioners. Some petitioners filed a notice of appearance and objection to the provisional class settlement. All petitioners participated in settlement negotiations through the AUO. Petitioners have submitted to the District Court, have accepted, and at times welcomed, the District Court's action on their behalf and have thereby waived any objection to personal jurisdiction.

Petitioners argue that in a class action, the *only* way a Court may obtain personal jurisdiction of class members is by notice and opportunity to opt out of the class on every litigated issue. This argument must fail. Indeed, in *Carlough v. Amchem Products*, 10 F.3d 189 (3rd Cir. 1993), a case relied upon heavily by petitioners, the court held that an injunction could not be entered against an absent class member *only* when there were no other minimum contacts with the forum *and* when they were denied the opportunity to opt out of the class.

In the case at bar, petitioners had more than just minimum contacts with the forum; they participated both formally and informally in the *Becherer* litigation as well as in ancillary cases. Moreover, at the evidentiary hearing that has been ordered on remand, there will likely be evidence of additional contacts petitioners have had with the District Court.

Petitioners' boldly stated and oft repeated assertion that the District Court lacked personal jurisdiction is

absurd because each petitioner opted into the District Court's personal jurisdiction when they became part of the class on the contract claims. Given that, petitioners are forced to argue that if the Court offers the class an opportunity to opt out of a settlement, it loses the personal jurisdiction it had gained before. This cannot be, because once petitioners consent to the jurisdiction of the District Court for one purpose, they consent for all purposes in the litigation. For example, a plaintiff is deemed to consent to the forum court's jurisdiction for all counterclaims, including non-compulsory counterclaims. *Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc.*, 25 F. Supp. 1021, 1022 (D.C.N.Y. 1939). Thus, in this case petitioners' position that the District Court did not have personal jurisdiction should be flatly rejected.[1]

## III. UNDER TRADITIONAL PRINCIPLES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL, THE DISTRICT COURT MAY PROPERLY ENJOIN PETITIONERS' STATE COURT PROCEEDINGS UNDER THE ANTI-INJUNCTION ACT UPON FINDING PETITIONERS IN PRIVITY WITH THE PARTIES BEFORE IT.

Under the relitigation exception to the Anti-Injunction Act, the District Court may *"enjoin a party before it* from attempting to relitigate an issue in a state court, to

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[1] In their brief at p.15 petitioners state, "No one contests that Petitioners lacked the requisite minimum contacts and that Petitioners did not consent to personal jurisdiction." In point of fact, everyone, including the District Court, the Court of Appeals and all defendants, contests that proposition.

'prevent any interference' with the federal court's judgment." *In re Ocean Ranger Sinking Off Newfoundland*, 617 F. Supp. 435, 436 (E.D. La. 1985) (citation omitted). The District Court may also enjoin non-parties who are in privity with parties before it. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992), *cert. denied*, 114 S. Ct. 1541 (1994); *Amalgamated Sugar Co. v. NL Industries, Inc.*, 667 F. Supp. 87, 94-5 (S.D.N.Y. 1987); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678, 686 (N.D. Tex. 1977), *aff'd* 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). A court will find a non-party to be in privity with a named party in a prior suit "where the party to the first suit is so closely aligned with the nonparty's interests as to be his 'virtual representative.' " *Royal Ins. Co.*, 960 F.2d at 1297 (citations omitted).

The Circuit Courts of Appeals agree that whether privity exists is a question of fact for the trial court. *See Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied sub nom., Metropolitan Dade County v. Aerojet-General Corp.*, 423 U.S. 1026 (1975); *see also Gerrard v. Larsen*, 517 F.2d 1127, 1135 (8th Cir. 1975) (remanding the case for a factual determination on issues of privity); *cf. NLRB v. Schnell Tool & Die Corp.*, 359 F.2d 39, 44 (6th Cir. 1966) (advising the plaintiff to bring supplemental proceedings before the National Labor Relations Board to determine issues of privity).

The District Court and the Court of Appeals did not err, much less depart from the accepted and usual course of judicial proceedings, in determining that the District Court could enjoin petitioners' state court proceedings if

the class plaintiffs "virtually represented" the interests of petitioners. Furthermore, the Court of Appeals did not depart from the standard course of proceedings in remanding the case to allow the District Court to make factual findings on this issue.

The decision of the Court of Appeals to remand the case for further factual findings is particularly appropriate given the likelihood that the District Court will find the parties before it virtually represented petitioners. Courts seeking to determine whether a named party was the virtual representative of a non-party consider such factors as the non-party's participation in the first trial, the non-party's apparent consent to be bound, apparent tactical maneuvering and the non-party's relationship to the named party. 18 C. Wright, et al., *Federal Practice and Procedure* § 4457 (1981 and Supp. 1995), all of which are present in this case.

Again, all petitioners participated in an expedited trial in the District Court on their breach of contract claims. Some petitioners filed an objection to the provisional settlement in the District Court. The belated filing of state court arbitration proceedings and the preliminary blocking of state court foreclosure proceedings by arguing the *res judicata* effect of *Becherer*, are examples of petitioners' tactical maneuvering. Finally, the AUO admits its members, including petitioners, are identical to the plaintiff class. Hence, the District Court would not depart from the accepted and usual course of proceedings on remand if it were to find that the parties before it virtually represented petitioners' interests.

## IV. BECAUSE THE DISTRICT COURT'S MARCH 24, 1992 ORDER LAPSED WHEN THE PROPOSED SETTLEMENT FAILED, QUESTIONS REGARDING THE ORDER'S CONSTITUTIONALITY ARE MOOT.

The District Court's March 24, 1992 Order, which directed counsel to provide class members with "accurate, objective, balanced information regarding the settlement," lapsed when the settlement failed. In cases in which an alleged violation has ceased and likely will not recur, or where interim events have "completely and irrevocably eradicated the effects of the alleged violation," the issues raised regarding the alleged violation become moot. *Finberg v. Sullivan*, 658 F.2d 93, 97-98 (3d Cir. 1980); *see also Super Tire Engineering Co. v. McCorkle*, 469 F.2d 911, 916 n.10 (3d Cir. 1972) ("Cases dealing with elections that have taken place, orders that have expired before review, and injunctions that have lapsed . . . are a third type of case in which mootness occurs."), *rev'd on other grounds*, 416 U.S. 115 (1974). Thus, as the Court of Appeals determined, petitioners' claims surrounding the purported unconstitutionality of the District Court's March 24, 1992 Order are moot. As such, this Court should decline to hear them.

## V. THE DISTRICT COURT'S MARCH 24, 1992 ORDER REPRESENTS A STANDARD EXERCISE OF THE DISTRICT COURT'S POWERS TO CONTROL CLASS ACTION LITIGATION.

The District Court's March 24, 1992 Order represented a proper exercise of the District Court's powers

under Fed. R. Civ. P. 23(d) to control class action litigation. According to Fed. R. Civ. P. 23(d)(3), a District Court may make orders that "impose conditions on the representative parties or on intervenors." Such conditions may not "create unwarranted barriers to class suits." 7B C. Wright, et al., *Federal Practice and Procedure* § 1794 (1986). For example, a court may not require parties to receive prior judicial approval before communicating with counsel or third parties. *Id.* A court may, however, place conditions on a counsel's communication with parties so long as a specific record supports the order, and so long as the order is narrowly drawn and specific. *Id.*

In this case, as mentioned above, the District Court did not prohibit communications between petitioners and their counsel, nor did it require prior judicial approval of any communications. Rather, the District Court required only that the communication from any of the lawyers representing petitioners (class counsel, petitioners' counsel, and AUO counsel) be accurate, objective, and balanced. Furthermore, the District Court limited its order to communications regarding the settlement. The District Court's order was thus narrowly drawn, specific, and directed to *all* involved counsel.

In addition, the District Court issued its Order only after holding a hearing to consider petitioners' counsel's demand that direct communications between petitioners and class counsel be terminated. At that hearing, the District Court determined that the settlement approval process could be undermined because of inaccurate advice rendered by any of the counsel. Hence, the District Court established a specific record supporting its order. The District Court, therefore, did not depart from the

accepted and usual course of proceedings when it issued the March 24, 1992 Order.

## CONCLUSION

For all the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated this 26th day of July, 1995

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1995

J. DON ADAMS, et al.,

*Petitioners,*

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Whether review of this non-final judgment is premature because the evidentiary hearing ordered by the Court of Appeals on the virtual representation issue may moot Petitioners' jurisdictional challenge.

II.

Whether review of this non-final judgment is premature because the evidentiary hearing ordered by the Court of Appeals on the virtual representation issue may yield additional facts relevant to jurisdiction.

III.

Whether review should be denied because the Court of Appeals' opinion does not conflict with holdings of this Court or any Circuit Court of Appeals and does not raise issues of general public importance.

IV.

Whether review of the District Court's order regulating attorneys' contacts with provisional settlement class members should be denied because the Order became moot when the settlement failed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

1. INTRODUCTION ..... 1

2. PETITIONERS' INITIAL INVOLVEMENT IN THIS LAWSUIT ..... 3

3. PETITIONERS' INVOLVEMENT THROUGH THE CERTIFIED CONTRACT CLASS ..... 8

4. THE PROVISIONAL SETTLEMENT CLASS ... 8

5. THE DISPOSITION OF THE NON-CERTIFIED CLAIMS ..... 9

6. THE FLORIDA ACTION ..... 9

7. THE SETTLEMENT SUPERVISION ORDER ... 12

8. THE DECISION ON APPEAL ..... 13

REASONS FOR DENYING THE WRIT ..... 14

I. REVIEW IS PREMATURE BECAUSE PROCEEDINGS ON REMAND MAY MOOT OR RESOLVE PETITIONERS' ISSUES ..... 14

A. REVIEW IS PREMATURE BECAUSE THE COURT OF APPEALS REMANDED THIS CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON VIRTUAL REPRESENTATION, THE RESULTS OF WHICH MAY MOOT THE ISSUES RAISED BY PETITIONERS ..... 15

TABLE OF CONTENTS – Continued

Page

B. REVIEW IS PREMATURE BECAUSE THE EVIDENTIARY HEARING MAY RESOLVE FACTUAL ISSUES PERTINENT TO JURISDICTION ..... 16

II. REVIEW IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS' HOLDING DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS AND DOES NOT RAISE ISSUES OF GENERAL PUBLIC IMPORTANCE ..... 17

A. THE HOLDING THAT PETITIONERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT DOES NOT CONFLICT WITH THE DECISION OF ANY COURT ..... 17

B. THE HOLDING THAT PETITIONERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT DOES NOT RAISE ANY ISSUE OF GENERAL PUBLIC IMPORTANCE ..... 23

III. REVIEW OF THE SETTLEMENT SUPERVISION ORDER IS INAPPROPRIATE BECAUSE THE ORDER HAS EXPIRED .... 24

CONCLUSION ..... 25

## TABLE OF AUTHORITIES

Page(s)

CASES

*Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed.2d 649 (1938) ..... 18

*Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054 (6th Cir. 1995) ..... 2, 14, 16, 20

*Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 809 F. Supp. 1259 (E.D. Mich. 1993) .... 2, 11, 20

*Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R. Co.*, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967) ..... 15

*Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) ..... 16

*Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993) ..... 21, 22

*General Contracting & Trading v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991) ..... 18, 19

*Gutor International, A.G. v. Raymond Parker Co., Inc.*, 493 F.2d 938 (1st Cir. 1974) ..... 19

*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed.2d 629 (1916) ..... 14

*Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) ..... 19

*In re Real Estate Title and Settlement Serv. Antitrust Lit.*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 442 (1989) ..... 21

*In re Y & A Group Securities Litigation*, 38 F.3d 380 (8th Cir. 1994) ..... 23

TABLE OF AUTHORITIES – Continued

Page

*International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) ..... 19

*Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067 (11th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 600, 126 L.Ed.2d 565 (1993) ..... 23

*U.S. v. Alvarez-Sanchez*, ___ U.S. ___, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994) ..... 22

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980) .....16, 19

STATUTES

28 U.S.C. § 2283 ..... 10

Fla. Stat. § 718.111(1)(a) ..... 3

COURT RULES

Fed. R. Civ. P. 16 ..... 8

Fed. R. Civ. P. 23 ..... 20

Fed. R. Civ. P. 42 ..... 8

Supreme Court Rule 10.1 ..... 17

SECONDARY AUTHORITIES

Wright, Miller & Kane, *Federal Practice and Procedure*, § 1424, p. 183 (1990) ..... 18

Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 4004, p. 508 (1977) ..... 17

## STATEMENT OF THE CASE

### 1. INTRODUCTION

This lawsuit relates to an investment in the Registry Hotel, a resort hotel in Naples, Florida, by Petitioners and other investors ("Unit Owners"). Merrill Lynch was sales agent for the offering. In August, 1989, a class action lawsuit was filed on behalf of all Unit Owners against the developer, Shelter Seagate Corporation ("SSG"), Merrill Lynch, the lender, architect, contractor, and others involved with constructing the Hotel for alleged breaches of contract, statutory and common law fraud and other torts. The District Court dismissed all claims against Merrill Lynch and awarded Unit Owners (including Petitioners) $6.7 million in damages against SSG and its principals.

The central, ongoing dispute between Merrill Lynch and Petitioners is whether the doctrine of "virtual representation" binds Petitioners to the District Court's judgments. The Petition does not, however, address virtual representation because the courts below have not finally determined whether the doctrine applies. The Court of Appeals remanded the case for an evidentiary hearing on that issue, but the hearing has not taken place because of this Petition.[1] If, after the hearing, Petitioners are bound, they will be enjoined from relitigating their claims against Merrill Lynch in Florida state court and in arbitration proceedings ("Florida Action").

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[1] Petitioners blocked that hearing by obtaining a stay of the mandate from the Court of Appeals.

Petitioners seek to prevent the evidentiary hearing by challenging the District Court's jurisdiction over them. The District Court held that Petitioners and the other class members consented to personal jurisdiction by litigating breach of contract claims against SSG as members of a certified class ("the Certified Contract Class") in this lawsuit prior to Merrill Lynch's dismissal:

> [T]he Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $6.7 million judgment from SSG [the Hotel developer], of which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

*Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 809 F. Supp. 1259, 1270 (E.D. Mich. 1993). The Court of Appeals affirmed this holding without discussion. *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054 (6th Cir. 1995).

This Court should not review this non-final judgment on a jurisdictional issue. Review is premature – the District Court will hold an evidentiary hearing on virtual representation. If the District Court finds in Petitioners' favor, Petitioners will be free to pursue the Florida Action and will no longer object to jurisdiction. The jurisdictional ruling, moreover, does not conflict with decisions of this or other courts and is not of general public importance.

Petitioners also seek review of the District Court's March 24, 1992 Order (the "Settlement Supervision Order") concerning the rights and responsibilities of class

counsel in providing information to Unit Owners concerning a proposed settlement. That settlement failed shortly after entry of the Settlement Supervision Order; the Order lapsed with it. The Court of Appeals held that Petitioners' objections to the Settlement Supervision Order were mooted by the settlement's failure. This Court should not review the Settlement Supervision Order because the Petition did not challenge the holding by the Court of Appeals that issues relating to the Settlement Supervision Order were moot. In any event, the Court of Appeals' holding was correct.

## 2. PETITIONERS' INITIAL INVOLVEMENT IN THIS LAWSUIT

Petitioners are not typical absent putative class members, whose sole knowledge of and involvement in the suit is the receipt of a class certification notice. Instead, all of the Unit Owners, including Petitioners, have had a sustained, organized involvement in this lawsuit since before it was filed through a formal organization composed of the Unit Owners – the Association of Unit Owners of the Registry Hotel ("AUO"). The AUO is a Florida non-profit corporation which is the equivalent of a condominium homeowners' association. The Unit Owners are the members of the AUO and elect the AUO Board. The AUO is charged by statute with a fiduciary duty to represent the interests of the Unit Owners. Fla. Stat. § 718.111(1)(a).

Beginning in October, 1988, when the AUO undertook to investigate and resolve its members' concerns over the Hotel's financial performance, the AUO has

initiated, financed, supported, directed, and monitored this lawsuit.

**The AUO selected and retained Class Counsel.** The AUO interviewed eight law firms and selected Elwood Simon (one of the present Class Counsel) "to investigate our situation; if there are potential damages, to negotiate, *and if the [AUO] Board decides*, ultimately to litigate the damages." (AUO Board Minutes, October 17, 1988, p. 1, emphasis added.)[2]

**The AUO financed Class Counsel's Investigation.** The AUO contracted with Class Counsel to represent Unit Owners for $250,000 plus a 25% contingency fee. The AUO paid the $250,000 – it budgeted $250,000 plus expenses for Class Counsel's investigation and authorized payment of the fees at $50,000 per month "out of operations."

**Class Counsel reported to the AUO Board.** Class Counsel periodically reported the progress of the investigation to the AUO orally and in writing.

**The AUO decided to file this action.** Class Counsel advised the AUO Board that although the AUO could pursue construction claims in its own name, claims related to the sale of securities and compliance with the terms of the offering could only be pursued in the names of Unit Owners.

The AUO accordingly decided on a three-front offensive: 1) a class action lawsuit would be filed on behalf of

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[2] These and the other AUO minutes and correspondence cited are in the District Court record. The authenticity of these documents was not disputed by Class Counsel or Petitioners.

the Unit Owners using the AUO's counsel and the AUO's investigation; 2) Unit Owners would withhold their mortgage payments; and 3) the AUO would pursue construction claims. This strategy was described at the 1989 AUO Annual Members' Meeting by Arthur Zaske, AUO Board President, who also told Unit Owners that if "negotiation falls through, then *we as owners would go to class action litigation.*" (emphasis added). The AUO President then wrote to each Unit Owner recommending the withholding of mortgage payments and asking all Unit Owners to contribute additional money to fund the class action litigation. He advised Unit Owners to "open direct lines of communication between you and the attorneys. The lead attorney is Elwood Simon. . . . "

**The AUO implemented its plan.** The AUO proceeded as planned. It first attempted to negotiate a settlement with the potential defendants on behalf of the Unit Owners. In August 1989, when negotiations failed, this lawsuit was filed, based upon the investigation initiated and funded by the AUO.[3]

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[3] The Complaint's preamble recited:

> Plaintiffs, by their attorneys, for their Class Action Complaint, allege upon personal knowledge and as to all other matters upon information and belief based upon, *inter alia, the investigation made by and through their attorneys* which investigation included, among other things, a review of offering documents, promissory notes, mortgages and other closing documents, accounting work papers, other litigation files, interviews with parties participant, and public and private records.

(Emphasis added).

The May 22, 1989 minutes of the AUO Annual Meeting confirms that these items constituted the AUO's investigation.

The AUO executed the second prong of its plan, persuading a substantial number of Unit Owners (including 59 of the Petitioners) to withhold mortgage payments on their Units. The AUO recommended a Naples attorney, Thomas Grady, to defend judicial foreclosure proceedings brought by the lender. Mr. Grady thus came to represent approximately 100 Unit Owners, including the Petitioners, several class representatives and the president and other AUO officers and Board members. (Mr. Grady is counsel for the Petitioners, as well as for the Florida Plaintiffs in the courts below and the Florida Action).

Mr. Grady's March 19, 1992 letter to the District Court acknowledges the close and direct connections between the Florida foreclosure proceedings, this lawsuit, and the AUO:

> [T]he number of Registry clients represented by this firm regularly increased. This was attributable in part to what I believe was a recommendation by Arthur E. Zaske [President of the AUO] to Unit Owners to discontinue paying their purported mortgage obligations to the lender.[4]
>
> [T]here was active encouragement [from the AUO] behind the scenes to cause Unit Owners to cease making these payments. . . . When Mr. Simon filed the class action lawsuit in August, 1989, that had the effect, which I believe was

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[4] Mr. Zaske ceased making mortgage payments himself . . . upon being sued in foreclosure by Trustbank, Mr. Simon requested, and I agreed that we represent Mr. Zaske as a professional courtesy in the defense of lenders' claims. . . . [footnote in original].

> anticipated, of encouraging additional Unit Owners to cease making mortgage payments. . . .

The AUO made sure that both prongs of their plan proceeded smoothly. Mr. Grady and Mr. Simon, as the AUO-designated attorneys in the foreclosure proceedings and this lawsuit, cooperated closely and coordinated strategy on both fronts. For example, Mr. Simon acted as Mr. Grady's co-counsel in a number of the foreclosure actions in order to facilitate coordination. Mr. Grady acknowledged this cooperation and collaboration in his letter to the District Court:

> I had always considered Mr. Simon as being *on the same team*, so to speak, as I was. That is not to say that we never disagreed regarding strategy but *I believe our objectives had never differed.*
>
> * * *
>
> Mr. Simon and I would consult from time to time on issues that were important to both of us in related litigation. . . . In consultation with Mr. Simon, I was successful in obtaining [rulings in the foreclosure proceedings, which] . . . I believe . . . furthered the objectives of the class plaintiffs . . .

(Emphasis added). Mr. Grady likewise acknowledged in open court that he and Mr. Simon "worked very closely together and . . . traded information on a very regular basis regarding the Registry Hotel project generally."[5]

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[5] By contrast, Mr. Grady now represents to this Court that his relationship with class counsel was "distant, but harmonious." (Cert. Pet., p. 7).

### 3. PETITIONERS' INVOLVEMENT THROUGH THE CERTIFIED CONTRACT CLASS

The District Court used its powers under Fed. R. Civ. P. 16 and Fed. R. Civ. P. 42 to efficiently manage the case. After recognizing that the "fraud" claims were based on breaches of contract, the District Court ordered an expedited, bifurcated trial on the breach of contract claims against SSG and its principals.

The District Court certified the class of Unit Owners for purposes of the contract claims *Each Petitioner chose to remain in the Class* and thereby participated in the bench trial on those claims.

At the start of the trial, the District Court entered summary judgment in favor of the Class on one claim, concerning the leasing of certain furniture, fixtures and equipment ("FF&E"), reserving a ruling on the amount of damages. The other claim, for the allegedly premature closing of the Hotel out of construction escrow, was tried by the District Court. It found that SSG breached the contract regarding the closing but that the breach was not material. After the settlement discussed below broke down, the District Court heard testimony on the amount of damages on the FF&E claim and awarded the Class, including Petitioners, a $6.7 million judgment.

### 4. THE PROVISIONAL SETTLEMENT CLASS

In February 1992, following the SSG trial but before the District Court's ruling, the parties reached a tentative

settlement. The District Court certified a provisional settlement class and approved the notice, which was sent to all Unit Owners. Some Petitioners opted out of the settlement class. Many Petitioners did not and became members of the provisional settlement class.[6] The provisional settlement class was dissolved when the settlement failed because of an excessive number of opt outs.

## 5. THE DISPOSITION OF THE NON-CERTIFIED CLAIMS

After the settlement failed, the District Court resolved the remaining claims on motion.[7] On August 7, 1992, the District Court dismissed all claims against Merrill Lynch, granting summary judgment on some claims and dismissing others on the pleadings.

## 6. THE FLORIDA ACTION

After the District Court's final ruling, Petitioners and other Grady clients ("Florida Plaintiffs") served Merrill Lynch with a Florida lawsuit based on the same claims dismissed by the District Court. The Florida Plaintiffs

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[6] Petitioners incorrectly assert that all of them either opted out or affirmatively reserved their right to object.

[7] The District Court had dismissed certain of the claims on November 20, 1990. That ruling was incorporated in the August 7, 1992 opinion.

also started a simultaneous arbitration proceeding against Merrill Lynch before the National Association of Securities Dealers.

Merrill Lynch immediately moved in the District Court to enjoin the Florida Actions on grounds of *res judicata* and collateral estoppel. Merrill Lynch argued that: 1) the Florida Plaintiffs, as members of the certified class, were directly bound as parties to the judgments and findings in the SSG trial; and 2) the Florida Plaintiffs were bound by the judgments and rulings on the non-certified claims under principles of privity, based on the Unit Owners/AUO's pervasive involvement in the case.[8]

On November 24, 1992, the District Court enjoined the Florida Plaintiffs from pursuing the claims actually decided in this lawsuit (the "Injunction"). It did not enjoin two counts (violation of the registration requirements of the Florida Securities Act and unsuitability). The District Court said these two claims were barred, but that it lacked authority to enjoin them because of the Anti-Injunction Act, 28 U.S.C. § 2283. It requested the Florida court to dismiss those claims.

The District Court rejected the Florida Plaintiffs' claim that it lacked personal jurisdiction over them:

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[8] Petitioners misstate Merrill Lynch's position when they assert that "Merrill Lynch asserted that Petitioners, as putative class members . . . , were bound by the district court's summary dismissal of the *Becherer* Plaintiffs' claims against Merrill Lynch." (Cert. Pet. at 3). Merrill Lynch has never taken the position that Petitioners were bound because they were members of an uncertified class.

> Florida plaintiffs also argue that this court does not have personal jurisdiction over them because no class was ever certified for purposes of the Merrill Lynch fraud claims. . . . Counsel for Florida plaintiffs confuses the concept of personal jurisdiction with the *res judicata* issue. I have personal jurisdiction over the Florida plaintiffs because they are parties to the case before me through their representatives. They also are members of the class in the breach of contract trial which I conducted, and as such are bound by the results of that trial. For these reasons, I conclude that there is personal jurisdiction over them. As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $ 6.7 million judgment from SSG, of which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

809 F. Supp. at 1270, footnote omitted.[9]

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[9] Petitioners incorrectly assert that "no one contests that the Petitioners lacked the requisite minimum contacts and that Petitioners did not consent to personal jurisdiction." (Cert. Pet., p. 15). Merrill Lynch has consistently argued that the court had jurisdiction based on consent and minimum contacts. To give but one example, in October 1992, Merrill Lynch submitted a "Supplemental Brief Regarding Jurisdiction Over The Florida Plaintiffs", the Argument section of which began:

> This Court continues to have jurisdiction over the Florida Plaintiffs because they are parties to the SSG class action [and] in privity with the class representatives and the AUO . . . In addition, . . . the Florida Plaintiffs have purposefully availed themselves of the

## 7. THE SETTLEMENT SUPERVISION ORDER

A schism developed between Mr. Grady and Mr. Simon over the proposed settlement. Mr. Simon was particularly concerned as to how Unit Owners who opted out of the settlement would be affected by the District Court's resolution of the non-Certified Contract Class claims in the event the proposed settlement failed, as reflected in his letter to Mr. Grady in February, 1992:

> I am greatly concerned that certain class members may harbor the unrealistic notion that, if they "opt out" of the Settlement, they will be able to relitigate the same factual issues, in what they believe to be a more receptive forum. . . .
>
> * * *
>
> [A]ny findings by the . . . court may be binding upon our mutually represented clients as a result of the doctrines of *res judicata*, collateral estoppel and issue preclusion. It is certainly the expressed opinion and intentions of counsel for the various defendants (including the Trustbank and Merrill Lynch defendants) . . . to interpose those defenses against any of the members of the (already certified) class who "opt out."[10]

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benefits of this forum. Under traditional due process analysis, it is not fundamentally unfair to subject them to the jurisdiction of this Court.

[10] The letter obviously rebuts Petitioners' disingenuous suggestion that Merrill Lynch opportunistically raised the preclusion issues only after obtaining judgment in its favor. As the letter notes, Merrill Lynch had taken the position that the District Court's rulings would bind all Unit Owners long before the District Court dismissed the claims against Merrill Lynch. It

Mr. Grady eventually demanded that Class Counsel stop communicating with Unit Owners who were also represented by Mr. Grady. This led to an Order to Show Cause regarding the rights and responsibilities of Class Counsel and Mr. Grady in connection with communications with Unit Owners. After further proceedings, on March 24, 1992, the District Court entered its Settlement Supervision Order, which provided that Class Counsel was entitled to communicate with all Unit Owners concerning the proposed Settlement, and directed all counsel to "impart only accurate, objective, balanced information regarding the settlement."

## 8. THE DECISION ON APPEAL

The holdings of the District Court were affirmed in part, reversed in part, and remanded for further proceedings. Three portions of the Court of Appeals' opinion relate to this Petition.

First, the Court of Appeals held that the District Court applied an incorrect legal standard in binding the Florida Plaintiffs to the non-class judgments because of privity. The Court concluded:

> [W]e must reverse the District Court's finding of privity and vacate its ensuing injunction. The briefs submitted by the parties on appeal, however, demonstrate a strong possibility that this case may yet be an appropriate one for the application of *res judicata* and collateral estoppel. Merrill Lynch contends that the Florida

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likewise rebuts the suggestion that Petitioners were somehow "blind-sided" by the preclusion issues.

> plaintiffs, through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the Becherer plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee.
>
> Because many of the facts discussed in the briefs are in dispute and because the issue was not fully developed and is essentially factual, we are unable to decide it here. Instead we remand the case to the District Court for factual findings under the narrower theory of virtual representation articulated above.

43 F.3d at 1071.

Second, it affirmed, without discussion, the District Court's ruling that it had personal jurisdiction over the Florida Plaintiffs.

Finally, it held that any issues relating to the Settlement Supervision Order were moot because the settlement had failed.

## REASONS FOR DENYING THE WRIT

### I. REVIEW IS PREMATURE BECAUSE PROCEEDINGS ON REMAND MAY MOOT OR RESOLVE PETITIONERS' ISSUES

The petition for certiorari should be denied because review is plainly premature. "[E]xcept in extraordinary cases, [certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed.2d 629 (1916). The lack of finality

"[is] a fact that of itself alone [is a] sufficient ground for the denial of the application." *Id. See also, Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). This case illustrates the wisdom of this rule.

### A. REVIEW IS PREMATURE BECAUSE THE COURT OF APPEALS REMANDED THIS CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON VIRTUAL REPRESENTATION, THE RESULTS OF WHICH MAY MOOT THE ISSUES RAISED BY PETITIONERS

Review of this case is premature. Petitioners' fundamental objection is to the Injunction enjoining them from pursuing the Florida Action. Had the District Court denied Merrill Lynch's motion and ruled that Petitioners were not bound by the non-class judgments, Petitioners' jurisdictional concerns would have disappeared.

That may still happen. The Court of Appeals *vacated* the Injunction and ordered the District Court to hold an evidentiary hearing on the virtual representation issue. That hearing has not occurred and is being blocked by the Petition. If the District Court on remand determines that virtual representation does not exist, then Petitioners will not be bound and will be free to proceed with the Florida Actions. This Petition is therefore premature and should be denied.

### B. REVIEW IS PREMATURE BECAUSE THE EVIDENTIARY HEARING MAY RESOLVE FACTUAL ISSUES PERTINENT TO JURISDICTION

Petitioners voluntarily submitted themselves to the jurisdiction of the District Court by becoming members of the Certified Contract Class. However, the District Court's evidentiary hearing may also develop facts which establish additional grounds for concluding that jurisdiction exists over Petitioners, because evidence establishing virtual representation also establishes jurisdiction.

As summarized by the Court of Appeals, Merrill Lynch has offered evidence "that the Florida plaintiffs, through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the Becherer plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee." This evidence shows that Petitioners "purposefully availed" themselves of the privilege of acting within the forum such that they would reasonably expect to be haled into court there, the touchstone of personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980). The Court of Appeals ordered an evidentiary hearing, however, "[b]ecause many of the facts . . . are in dispute and because the issue was not fully developed and is essentially factual . . . " 43 F.3d at 1071 (emphasis added).

This Court will not ordinarily address unresolved factual issues. *Carden v. Arkoma Associates*, 494 U.S. 185, 197, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). Review is therefore premature.

## II. REVIEW IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS' HOLDING DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS AND DOES NOT RAISE ISSUES OF GENERAL PUBLIC IMPORTANCE

The Court of Appeals' ruling does not conflict with the holding of this Court or any Court of Appeals and does not raise any issue of general public importance. *See* Supreme Court Rule 10.1. *See also,* Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure,* § 4004, p. 508 (1977) ("General public importance of the issues, and the general need to secure uniformity of federal law, must be the basic touchstones [of granting review]").

### A. THE HOLDING THAT PETITIONERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT DOES NOT CONFLICT WITH THE DECISION OF ANY COURT

The District Court held that jurisdiction exists because Petitioners voluntarily came before the Court as members of the Certified Contract Class. A discussion of this holding is strangely absent from the Petition. Instead, Petitioners cite general propositions that a judgment entered without personal jurisdiction violates due process, and that consent or minimum contacts are required for personal jurisdiction. The opinions below do not conflict with either of these propositions. Neither court below held that personal jurisdiction was unnecessary or that it could be established without consent or minimum contacts.

The District Court correctly held that it had personal jurisdiction over the Florida Plaintiffs because each of the Florida Plaintiffs voluntarily came before the Court as a member of the Certified Contract Class and obtained a $6.7 million judgment on those certified claims. Once Petitioners consented to the jurisdiction of the District Court for one purpose, they consented for all purposes in the litigation.

This Court and others recognize that a party asserting claims before a court is subject to that court's jurisdiction with respect to other claims before that court. The general principle is straightforward: "Once plaintiff has entered the jurisdiction for purposes of bringing an action, the cases indicate that he is also within the court's power for any claims that may be asserted against him." Wright, Miller and Kane, *Federal Practice and Procedure*, § 1424, p. 183 (1990). In *Adam v. Saenger*, 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed.2d 649 (1938), a Texas corporation's filing of a lawsuit in California gave the California court personal jurisdiction over a cross-claim against that corporation:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, *there is nothing arbitrary or unreasonable in treating him as being there for all purposes* for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

(Emphasis added). Similarly, in *General Contracting & Trading v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991), the

court held that a third-party defendant (Tratsco) submitted to the district court's jurisdiction when it brought a separate suit arising from the same transaction in the same court:

> Tratsco elected to avail itself of the benefits of the New Hampshire courts *as a plaintiff*, starting a suit against Interpole. By so doing, we think it is inevitable that Tratsco surrendered any jurisdictional objections to claims that Interpole wished to assert against it in consequence of the same transaction or arising out of the same nucleus of operative facts.

*Id.* at 23, emphasis in original. Indeed, a party initiating a suit consents to that court's jurisdiction even for claims that do *not* arise out of the same nucleus of operative facts. For example, a plaintiff is deemed to have consented to the forum court's jurisdiction for all counterclaims, including non-compulsory counterclaims. *Gutor International, A.G. v. Raymond Parker Co., Inc.*, 493 F.2d 938, 947 (1st Cir. 1974).

These cases are consistent with basic due process constraints on personal jurisdiction. Due process requires that a non-resident defendant possesses minimum contacts with the forum state such that the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Due process is satisfied when a defendant "purposefully avails itself of the privilege of conducting activities within the forum state" such that it would reasonably expect to be haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Hanson v. Denckla*, 357 U.S.

235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Petitioners' pursuit of a lawsuit in the District Court is a very purposeful availment of the privilege of acting in that forum. It is neither unfair nor surprising for the District Court to resolve other matters relating to the subject matter or parties involved in the lawsuit.

Petitioners mistakenly emphasize that the Certified Contract Class was limited to certain claims against certain defendants and that they cannot be bound under Fed. R. Civ. P. 23 to any judgment on uncertified claims. (Cert. Pet. at 16). As the District Court recognized however, this argument "confuses the concept of personal jurisdiction with the *res judicata* issue." 809 F. Supp. at 1270. The lack of class certification on some claims means that the Florida Plaintiffs are not bound *under Rule 23*. It does not mean, however, that the District Court lacks personal jurisdiction over Petitioners to determine whether they are bound for other reasons such as *res judicata* and collateral estoppel. As the Court of Appeals held:

> While plaintiffs argue at length that the injunction was improper because putative class members cannot be bound absent notice and an opportunity to opt out, this focus fails to recognize that the District Court's ruling was premised on the concepts of *res judicata* and collateral estoppel, which are separate and independent of class certification. If either of those doctrines is applicable, the formalities of class certification are irrelevant.

43 F.3d at 1069.

Because the District Court has jurisdiction, the principal cases cited by Petitioners, *In re Real Estate Title and Settlement Serv. Antitrust Lit.*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 442 (1989) and *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 200 (3d Cir. 1993) are not on point. Petitioners cite *Real Estate Title* for the proposition that a court must have personal jurisdiction over the person it seeks to enjoin, and that a putative class member does not consent to jurisdiction by appearing solely to opt out. *Id.* at 771. The court further stated, however: "Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has *shown a willingness to engage in extensive litigation in the forum.*" *Id.* at 771 (emphasis added). Petitioners have shown such a "willingness to engage in extensive litigation in the forum" by litigating the certified claims and attempting to collect on their judgment, and have therefore consented to the court's jurisdiction.

Petitioners cite *Carlough* for the proposition that a court does not have jurisdiction over putative class members in the absence of an opportunity to opt out. *Carlough*, however, held that due process is violated where a federal court enjoins an absentee class member "whose minimum contacts with the forum have not been established or, in lieu of minimum contacts, who has not consented to the court's jurisdiction, explicitly or inferentially." *Id.* at 199. The court similarly explained that the right to opt out was a prerequisite to jurisdiction over absent class members *"who otherwise have no affiliation with the forum."*

*Id.* (emphasis added). Again, *Carlough* supports the exercise of jurisdiction over Petitioners. Petitioners cannot pretend to be strangers to the forum. Their consent to jurisdiction on the certified claims waived any challenge to personal jurisdiction on other claims.

The other points raised by the Petitioners are equally unavailing. Petitioners argue that "virtual representation is not a substitute" for personal jurisdiction. This assertion is irrelevant, because the courts below did not hold that it was a "substitute." Jurisdiction exists because Petitioners voluntarily brought claims before, and obtained a judgment from, the Court. Jurisdiction also exists because Petitioners engaged in a variety of other activities which reflect "purposeful availment" of the benefits of the forum. That other conduct also bears on the existence of virtual representation, but the fact that Petitioners' extensive involvement in this litigation may establish both jurisdiction and virtual representation does not mean that one is a "substitute" for the other.

The Petitioners also argue that the District Court cannot enter an injunction under the relitigation exception to the Anti-Injunction Act without personal jurisdiction. There is no need to address the issue, since personal jurisdiction exists.

Finally, Petitioners argue that the Federal Arbitration Act deprives the District Court of the power to determine whether Petitioners are bound. Petitioners never raised this issue below, and therefore may not obtain review of it in this Court. *U.S. v. Alvarez-Sanchez*, ___ U.S. ___, 114 S.Ct. 1599, 128 L.Ed.2d 319, 329 n.5. (1994). In any case, the argument is meritless. The Federal Arbitration Act

does not bar a court from enjoining arbitrations which are barred by *res judicata*. "Courts should not have to stand by while parties reassert claims [in arbitration] that have already been resolved." *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 600, 126 L.Ed.2d 565 (1993). *Accord*, *In re Y & A Group Securities Litigation*, 38 F.3d 380, 382 (8th Cir. 1994).

In summary, not only is the District Court's holding not in conflict with other authority, it is supported by all relevant authority. Review is therefore inappropriate.

### B. THE HOLDING THAT PETITIONERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT DOES NOT RAISE ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

No issues of general public importance are raised by the holding that Petitioners are subject to the jurisdiction of the District Court. This holding is fact specific. The factual context is both complex and unusual, as reflected by Petitioners' inability to point to cases which conflict with the jurisdictional ruling in this case. Simply stated, the jurisdictional issue is one that is of importance only to the parties to this case. Review, therefore, is inappropriate.

## III. REVIEW OF THE SETTLEMENT SUPERVISION ORDER IS INAPPROPRIATE BECAUSE THE ORDER HAS EXPIRED

Petitioners also seek review of the March 24, 1992 Settlement Supervision Order. The Court of Appeals held that any issues relating to that Order were moot. Petitioners do not challenge this holding. Instead they simply ignore it. The failure to address the holding of the Court of Appeals obviously makes review of that holding inappropriate.

In any case, the Court of Appeals was plainly correct. The Order on its face relates solely to communications concerning the proposed settlement. The proposed settlement failed in the Spring of 1992. The Order thus expired more than three years ago, and any issues relating to it are moot. Review of the Settlement Supervision Order is therefore inappropriate.

## CONCLUSION

This Court should not review the jurisdictional ruling because review is premature and because the ruling does not conflict with holdings of this Court or any Circuit Court of Appeals and does not raise issues of general public importance. This Court should not review the Settlement Supervision Order because that Order is moot. The petition for certiorari should therefore be denied.

Respectfully submitted,

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Dated: July 26, 1995

(5)

Supreme Court, U.S.
FILED
SEP 13 1995
CLERK

No. 94-1968

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1994**

J. DON ADAMS, et al.,
*Petitioners,*

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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## SUMMARY OF REPLY ARGUMENT

I.

The Petition is ripe for review because it contains issues that are "fundamental to the further conduct of the case." *Land v. Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L. Ed. 1209, 1214, n. 2 (1947).[1] Respondent's Due Process and First Amendment rights are threatened by the scope of remand proceedings directed by the Sixth Circuit, regardless of the district court's ultimate ruling on the existence of virtual representation.

II.

Due process in a class action suit requires compliance with FED. R. CIV. P. 23. The jurisdiction the district court acquired via Rule 23 was limited by the notice to class members of the issues certified against the defendants specified. Accordingly, the district court obtained jurisdiction over Petitioners, as part of the SSG class, solely for the contract claims it asserted against the SSG defendants. The district court certainly did not obtain jurisdiction over Petitioners for any claims beyond those between the SSG class and the SSG Defendants. Significantly, Respondents Merrill Lynch and LeHill Partners[2] were not one of the SSG defendants.

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[1] Overruled on other grounds, *Pennhurst State School & Hosp. v.Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L. Ed. 2d 67 (1984).

[2] Nor were Lehill Partners' predecessors, Dominion Financial Investment Corp. (which changed its name to Trustbank Mortgage Center Inc.).

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . iii

ARGUMENT . . . . . 1

I. REVIEW IS PROPER BECAUSE RESOLUTION OF THE ISSUES IS FUNDAMENTAL TO THE FURTHER CONDUCT OF THE CASE . . . . . 1

II. PETITIONERS' PARTICIPATION IN THE CLASS ACTION LIMITED TO SPECIFIED CLAIMS AGAINST THE SSG DEFENDANTS DID NOT PROVIDE PERSONAL JURISDICTION TO THE DISTRICT COURT FOR AN ACTION AGAINST RESPONDENTS, BECAUSE JURISDICTION OBTAINED PURSUANT TO FED. R. CIV. P. 23(c)(4)(A) IS LIMITED TO THE CLAIMS AND PARTIES THAT ARE PART OF THE LIMITED CLASS ACTION . . . . . 5

CONCLUSION . . . . . 10

## TABLE OF AUTHORITIES


| Cases | Page(s) |
|---|---|
| *Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454 82 L.Ed. 649 (1938) | 7, 8 |
| *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 13 S.Ct. 758, 37 L.Ed. 486, 491 (1893) | 2 |
| *Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc.*, 25 F. Supp 1021 (E.D. N.Y. 1939) | 8 |
| *Dykes v. Trustbank Savings F.S.B.*, 567 So.2d 958 (Fla. App. 1990) | 10 |
| *Forsyth v. Hammond*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897) | 1 |
| *General Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991) | 8 |
| *Gutor Int'l. A.G. v. Raymond Parker Co., Inc.*, 493 F.2d 938 (1st Cir. 1974) | 8 |
| *Hurley v. Irish-American Gay Group*, 515 U.S. __, 132 L. Ed. 2d 487, 507, 115 S.Ct. 2338 (1995) | 2 |
| *In Re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.) *cert denied*, 493 U.S. 959 (1989) | 5 |
| *In Re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) | 10 |

*International Shoe Co. v. Washington,*
326 U.S. 310, 66 S.Ct. 154,
90 L.Ed. 95, 102 (1945) . . . . . 8

*Irving Trust Co. v. Nationwide Leisure Corp.,*
562 F.Supp 960 (S.D. N.Y. 1982) . . . . . 8

*Land v. Dollar,*
330 U.S. 731, 67 S.Ct. 1009,
L.Ed. 1209, 1213 n. 2 (1947) . . . . . i, 1

*Matsushita Electric Industrial Co., Ltd. v. Epstein,*
(Dkt. No. 94-1809) . . . . . 5

Nix v. Grand Lodge of Int Ass'n of Mach. & Aero. Wkrs.,
479 F.2d 382, 385 (5th Cir. 1973) . . . . . 5

*Officers for Justice v. Civil Service Com'n,*
688 F.2d 615, 623 (9th Cir. 1982) . . . . . 5

*Pennhurst State School & Hosp. v. Halderman,*
465 U.S. 89, 104 S.Ct. 900,
79 L.Ed. 2d 67 (1984) . . . . . i

*Schwarzchild v. Tse,*
58 F.3d 430 (9th Cir. 1995) . . . . . 9

*Sullivan v. Chase Investment Services of Boston, Inc.,*
79 F.R.D. 246 (N.D. Ca. 1978) . . . . . 5

*The Brake Shop, Inc. v. Dacey,*
793 F. Supp 154 (E.D. MI. 1992) . . . . . 6

*United States v. General Motors Corp.,*
323 U.S. 373, 65 S.Ct. 357,
89 L.Ed. 311, 318 (1945) . . . . . 1

*United States v. The Three Friends,*
*166 U.S. 1, 17 S.Ct. 495*
*41 L.Ed. 897 (1897)* . . . . . 1

*Wulf Oil Corp. v. Grebe Drilling Co.*,
93 Mich. App. 793,
287 N.W.2d 344 (1979) . . . . . 6

**Statutes**

Fed. R. Civ. P. 4(k) . . . . . 10

Fed. R. Civ. P. 23 . . . . . i, 3, 4, 5, 8

**Other**

7B Wright, Miller, Kane, *Federal Practice and Procedure* 9, 10

## ARGUMENT

### I. REVIEW IS PROPER BECAUSE RESOLUTION OF THE ISSUES IS FUNDAMENTAL TO THE FURTHER CONDUCT OF THE CASE

Respondents LeHill Partners and Merrill Lynch ("Respondents") oppose the instant Petition for Writ of Certiorari, claiming review is premature because remand to the district court may moot the issues raised in the Petition. The rule against granting certiorari to a case that is not "final" is not absolute or without exception. "[G]iven the extraordinary nature of the writ, the Court should be free to step into the proceedings if the order or judgment of the appellate court, albeit not final, merits review at that time." 12 Moores Fed Practice ¶ 434.01; 6-43. Not only "should" the Court be free to review non-final cases, it has done so and granted certiorari in the absence of a final judgment. *See United States v. The Three Friends*, 166 U.S. 1, 17 S.Ct. 495, 41 L. Ed 897 (1897); *Forsyth v. Hammond*, 166 U.S. 506; 17 S.Ct. 665, 41 L. Ed. 1095 (1897).

The Court will grant certiorari when the Petition contains issues that are "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 736, 67 S.Ct 1009, 91 L. Ed 1209, 1214, n2 (1947). The Court considered an issue "fundamental to the further conduct of the case" when it involved the proper interpretation of a constitutional guarantee, *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L. Ed. 311, 318 (1945); as a result it granted certiorari despite the Circuit Court's remand of the matter to the district court for further consideration. The Court reasoned that review was necessary because the Circuit Court's holding was dependent upon the scope and meaning of the Fifth Amendment of the Constitution. Similarly, review is necessary in the instant case because the viability of the Circuit Court's substitution of "virtual representation" for the actual and contrary notice afforded is dependent upon the scope and meaning of the Due Process clause of the United States Constitution. (See Petition, p 13-21).

Equally important is the Circuit Court's failure to vacate the "Gag Order" and relieve Grady from the threat of pending sanctions for communicating with his clients, vitiating the guarantees afforded under the First Amendment to the U.S.

Constitution. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay Group,* 515 U.S. __, 132 L. Ed. 2d 487, 507, 115 S.Ct. 2338 (1995).

Even as Respondents argue that the constitutional issues under the "Gag Order" are moot, the District Court is poised to sanction Grady for the advice he provided to his clients. This is evidenced by the District Court's repeated (post-Sixth Circuit opinion) references to revisiting the Motions for Sanctions. As noted in the Petition, Petitioners' ability to contest the constitutionality of the "Gag Order" rests solely with this Court. *See Petition,* p 25 and cases cited therein.

Similarly, the Court will accept a Petition for Certiorari, despite the lack of finality, when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.,* 148 U.S. 372, 13 S.Ct. 758, 37 L. Ed. 486, 491 (1893). Granting the instant Petition will not only prevent extraordinary inconvenience and embarrassment, but it will prevent the abrogation of the attorney/client privilege. Even before the return of the mandate from the Sixth Circuit Court of Appeals, the District Court initiated (on its own motion) a discovery period on the issue of whether Petitioners were bound under the doctrine of virtual representation. Respondent Merrill Lynch ("Merrill") issued document subpoenas, not only to "class counsel" Elwood Simon, but to other attorneys who provided independent representation to members of the putative class (which was never certified). As evidenced by the Merrill subpoenas, there is simply no way to conduct meaningful discovery on the issue of virtual representation without impinging on the attorney/client privilege.[3]

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[3] In remanding the case, the Sixth Circuit Court quoted Wright, Miller & Cooper, Federal Practice and Procedure §4457 (1981) with approval in discussing factors which may support a "narrow role" for "virtual representation". "Close nonlitigating relationships with a party, participation, apparent acquiescence and perhaps deliberate maneuvering to avoid the effects of the first action are among the factors to be weighed . . . ." 43 F.3d at 1070. In the instant case, the only non-litigating relationships are through the

Thus, the theory of "virtual representation" has been used both to chill the advice of counsel and to conduct an ex post facto inquisition into the actual advice provided by counsel. These issues will never be more ripe for appellate review.

Merrill's subpoenas seek many documents protected pursuant to the attorney/client and work product privileges including "The 'monthly updates' referenced in Grady's February 21, 1992 memo to his 'Registry Clients.'" "Time records, summaries, billing slips, calendars, diaries or similar documents describing services provided in connection with the investigation or the Litigation by Grady."[4]

The indicia of "virtual representation" discussed in Respondent Merrill's brief emphasize the interference a remand for "fact finding" regarding virtual representation would have upon the attorney/client privilege existing between Petitioners and Thomas Grady. The very indicia cited by Merrill, even if established, would permit a finding of "virtual representation" only by disregarding the attorney/client privilege, FED. R. CIV. P. 23, and Due Process Guarantees.

For example, Merrill argues at p. 4 of its Brief Opposing the Petitioner for Certiorari ("Brief") that the AUO financed Simon's investigation. But what Simon determined is (first of all, properly privileged) that a class action could *not* be filed by the AUO, but must be filed by individual plaintiffs. Indeed, the very notion that individual plaintiffs can file a "class action" is a misnomer on the part of Merrill. Individuals only file individual actions, *inter alia* requesting class certification. When certification is granted (after notice and opportunity to opt out) the action becomes a "class action".

Merrill argues at p. 5 of its Brief that the AUO encouraged individual unit owners to "open direct lines of communication" with class counsel. But that communication would be privileged.

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AUO -- of which every unit owner is a member by virtue of his purchase (hence no discovery is required). The others will only be revealed by probing communications with, and the thought processes of, Petitioners' counsel.

[4] Merrill Lynch's document Request to Thomas Grady, 3/13/95, reprinted in Appendix A.

And it properly should be the right of any putative class member, under the First Amendment, FED. R. CIV. P. 23 and the Due Process Clause, to communicate with Elwood Simon *before finding class counsel unacceptable*. To suggest that the right to opt out should be denied or that virtual representation exists because an individual consults with class counsel turns Rule 23 and all notions of Due Process on their heads.

The fact (if proven) that the AUO "persuaded" (whatever that means) 59 petitioners to withhold mortgage payments (Brief, p. 7) certainly suggests a privileged communication. Moreover, that has nothing whatsoever to do with whether Merrill is entitled to foreclose future litigation against members of a putative class of securities claimants who opted out of the class action. Why remand for such a finding of fact? The issue, under a virtual representation theory, is not whether the AUO "persuaded" members to take unrelated legal action, but the extent to which those members actually participated in and controlled the class action.

The fact that Grady consulted with Simon, and their objectives initially did not differ (a situation to be found in any class action), hardly suggests that Grady's clients should be precluded from opting out of the proposed settlement *against* Simon's wishes and *against* Simon's advice. If FED. R. CIV. P. 23 means anything, it is that clients have a right to separate counsel on the issue of opting out and a *right* to their own choice as to whether to accept a class settlement. That would be true *even if Simon was their attorney in fact and their only attorney in fact*. Neither class counsel nor the district court owns the chose in action -- only the individual plaintiffs -- and it is those individual plaintiffs who are constitutionally vested with Due Process rights.

In sum, the thrust and scope of post-remand fact-finding is now clear. The post-remand fact-finding directed by the Sixth Circuit and pursued by Merrill will run roughshod over the First Amendment and Due Process rights of Petitioners. The operative "facts" suggested by the Sixth Circuit grossly distort the effect of FED. R. CIV. P. 23. This is not a case in which a favorable post-remand determination by the district court might render moot the issues presented in the petition. The very process of remand threatens violation of Petitioner's First Amendment and Due Process rights, as well as the rule and the spirit of FED. R. CIV.

P. 23.[5] These issues are ripe. The Petition is proper for review.

## II. PETITIONERS' PARTICIPATION IN THE CLASS ACTION LIMITED TO SPECIFIED CLAIMS AGAINST THE SSG DEFENDANTS DID NOT PROVIDE PERSONAL JURISDICTION TO THE DISTRICT COURT FOR AN ACTION AGAINST RESPONDENTS, BECAUSE JURISDICTION OBTAINED PURSUANT TO FED. R. CIV. P. 23(c)(4)(A) IS LIMITED TO THE CLAIMS AND PARTIES THAT ARE PART OF THE LIMITED CLASS ACTION

A court, pursuant to FED. R. CIV. P. 23(c)(4)(A), may certify a class on a particular or limited issue. When a court does certify a class for such a limited purpose, however, "other issues [are] to be adjudicated on an individual basis."[6] 7B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790, at 274 (1986). *See e.g., In Re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.) *cert denied*, 493 U.S. 959 (1989); *Sullivan v. Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246 (N.D. Ca. 1978).

Section (c)(4) of Rule 23 specifically states: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues. . . . This clearly means that the district court may take only those parts of a lawsuit which lend themselves to convenient use of the class action motif." *Nix v. Grand Lodge of Int Ass'n of Mach. & Aero. Wkrs.*, 479 F.2d 382, 385 (5th Cir. 1973).

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[5] The Court's grant of certiorari in *Matsushita Electric Industrial Co., Ltd. v. Epstein*, (Dkt. No. 94-1809), confirms Petitioners' assertion that the parameters of FED. R. CIV. P. 23 coupled with due process concerns are issues of importance to jurisprudence, as well as the public.

[6] The Ninth Circuit recognized the evil that may result when the strictures of Rule 23 are not complied with: "The class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks. . . . 'Class actions are unique creatures with enormous potential for good and evil.' . . . Consequently, FED. R. CIV. P. 23 establishes a procedural framework designed to protect against the shortcomings of the class action device." *Officers for Justice v. Civil Service Com'n*, 688 F.2d 615, 623 (9th Cir. 1982).

In this respect, the personal jurisdiction a court obtains over a plaintiff class via FED. R. CIV. P. 23 (c)(4)(A) is limited, similar to the limited personal jurisdiction obtained via a state long arm statute.[7] Long-arm statutes allow personal jurisdiction, limited to claims arising out of the act or acts creating the jurisdictional relationship between the defendant and the state. *Wulf Oil Corp. v. Grebe Drilling Co.*, 93 Mich. App. 793, 287 N.W.2d 344 (1979). For example, while a party's commission of a tort within the state of Michigan subjects him to the limited personal jurisdiction of a Michigan court for the tort, the Michigan court does not obtain personal jurisdiction for other actions, *i.e.*, a divorce action, a contract action, et cetera. *Id.* Similarly, while the District Court obtained limited personal jurisdiction relating to Petitioners' contract claims against the SSG defendants pursuant to FED. R. CIV. P. 23, it did not, by virtue of the contract claim, obtain personal jurisdiction over Petitioners for other actions against other non-SSG defendants.

Neither of the principal Respondents (Merrill and Trustbank) were even parties to the claims presented by the certified class. While those Respondents correctly note that commencement of suit against a defendant subjects the plaintiff to potential counterclaims of that defendant, a plaintiff's commencement of a suit against a defendant **does not subject the plaintiff to the potential "counterclaims"/claims of a non-defendant.**[8] The chart of the parties in the instant litigations illustrates the flaw in Respondents' assertion. See Appendix B.

It is absurd to suggest that, because Petitioners were part of Case I, they are bound by the final decision in Case II when Case II was never certified as a class action pursuant to FED. R. CIV. P. 23(b); Petitioners were not Plaintiffs in Case II, and the Defendants in Case II were not a party to Case I. Yet, that is precisely Respondents' argument.

The District Court clearly recognized the impropriety of this assertion when it ordered certification to occur for the limited

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[7] While there is no federal equivalent, the federal courts generally adhere to the long-arm statute of the state in which it sits. *See e.g., The Brake Shop, Inc. v. Dacey*, 793 F. Supp 154 (E.D. MI. 1992).

[8] Neither the cases cited by Respondents, nor any cases for that matter, support the contrary.

purpose of settlement in February, 1992. There would be no need for such certification at that time, if the court already had jurisdiction over all of the putative class members. Additionally, the court initially criticized Merrill for even suggesting that putative class members would be bound without certification, aptly characterizing Merrill's assertions as "shifty."[9]

*Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L. Ed. 649 (1938), cited in Respondents' briefs, offers no support for their assertion that Petitioners consented to the jurisdiction of the district court for anything other than the specified contract claims against the SSG defendants (and any counterclaims asserted by the SSG defendants). The *Adam* Court held the Fourteenth Amendment does not preclude the service of a defendant's counterclaim upon counsel for plaintiff as a condition to permitting plaintiff's use of the state court. *Id.* at 67-8. *Adam* is easily distinguished from the instant case because: 1) Respondents were not defendants to the only class claim in which Petitioners were a party (Case I); 2) Respondents did not assert a counterclaim, or any claim for that

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[9] Mr. Egan: Dennis Egan appearing on behalf of Merrill Lynch. Merrill Lynch has -- has one concern, is talking class certification on two narrow issues, which we don't think is necessary. We believe the Court can try the case as to these individual Plaintiffs, and in fact, if the Plaintiffs fail to prove their case, that's the end of the case. We don't need to get into notice. We don't need to get into opt-outs, all of which will have to be accomplished before any trial begins.

The Court: Well, Mr. Egan, how do you handle this? *Those parties who are not parties right now, who are not Plaintiffs right now, we want finality as to them, don't we? I don't want to go through this expedited trial involving only the Becherer Plaintiffs, and then have some other unit holders come along a couple of months from now and say, well we weren't a part of that lawsuit, and we're all ready to go, Judge. We want finality here, don't we.*

Mr. Egan: Your Honor --

The Court: *They ought - they ought either to be in or out of this case.*

Mr. Egan: We have two concerns. First, one, that finality could be dealt with at the conclusion of the case and may well be collateral estoppel on other persons anyway, be -- but --

The Court: That's a ***shifty*** kind of -

[March 12, 1991 Status Conference, at pp. 26-29 (emphasis added).]

matter, against Petitioners; and 3) *Adam* is distinguishable because it did not involve a class action, much less a limited class action pursuant to FED. R. CIV. P. 23(c)(4)(A).[10]

If the Court accepts Respondents' theory that the District Court obtained general personal jurisdiction over Petitioners by their implied consent to try the contract claims--it will create a major disincentive to any plaintiff to allow any claim to be tried by a class action. In effect, despite the notice, class counsel would obtain complete control over the entire chose and all related claims--a clear deprivation of property without due process of law, as well as a clear breach of "traditional notions of fair play and substantial justice," the defining standard of due process constraints. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95, 102 (1945).

Merrill essentially argues that if a putative class plaintiff consents to have any claim against any defendant tried in a class action, that plaintiff consents to having all claims tried in the same action. That proposition cannot be reconciled with the notice provision of FED. R. CIV. P. 23, with the general purpose of class actions, nor, in particular, with the notice the District Court provided to the Petitioners in the instant case.[11]

The fact that "[m]any petitioners did not [opt out] and became members of the distinct provisional settlement class" [Merrill, p. 9 (emphasis added)] should not be used to foreclose their rights now. Indeed, the very fact that the certified class was "provisional" makes clear that the district court acquired jurisdiction over Case II pursuant to separate and independent certification in 1992, over

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[10] Similarly, Respondents reliance on *General Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991); *Gutor Int'l. A.G. v. Raymond Parker Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *Irving Trust Co. v. Nationwide Leisure Corp.*, 562 F.Supp 960 (S.D.N.Y. 1982) and *Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc.*, 25 F.Supp 1021 (E.D.N.Y. 1939) is misplaced.

[11] The Notice of Pendency of Class Action clearly stated: "THE COURT'S ORDER GRANTING CLASS ACTION STATUS WAS LIMITED SOLELY TO BREACH OF CONTRACT CLAIMS AGAINST SSG AND THEIR AFFILIATES AS DISCUSSED MORE FULLY HEREIN." Notice of Pendency of Class Action (capitalization and emphasis in original).

one year after certification of the SSG contract class against the SSG defendants.

In fact, the class of claimants adverse to Merrill was never more than provisional *because* Merrill refused settlement with the remaining provisional class members. Now Merrill wants to, in effect, create a post-judgment certification of the class[12] -- a clear violation of Rule 23. The Ninth Circuit Court of Appeals recently recognized that post-judgment certification is not available to those defendants who seek summary judgment prior to certification and notice (with an opportunity to opt-out) to the class. *Schwarzchild v. Tse,* 58 F.3d 430 (9th Cir. 1995). "[W]hen defendants obtain summary judgment before the class has been properly certified or before notice has been sent, they effectively waive their right to have notice circulated to the class under Rule 23(c)(2); in such cases the district court's decision **binds only the named plaintiffs.**" *Id.* at 434 (emphasis added). Accordingly, Respondents' assertions to the contrary are clearly erroneous,[13] entitling Petitioners to relief.

Respondents really argue for an implied grant of jurisdiction over the Petitioners that extends far beyond the scope of jurisdiction specified in the SSG class notice. That is not only a plain violation of the Rule 23(c)(2) requirement of the "best notice practicable under the circumstances," but also a violation of the fundamental rights of class members. "The proposition that the notice called for by Rule 23(c)(2) involves due process considerations is essential to give binding effect to a decree in a class action can be traced to the Supreme Court's decision in *Mullane v. Central Hanover Bank and Trust Co."* See 7B Wright, Miller, Kane, *Federal Practice and Procedure*, §1786, p. 190.

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[12] Merrill points out on p. 9 that they obtained summary judgment on the non-certified claims. But Merrill does not state against whom. The obvious answer is that Merrill, by its own choice, obtained judgment only against the named plaintiffs in an individual action. This is just Merrill's oblique attempt to obtain a post-judgment class certification under the guise of "virtual representation".

[13] *Schwarzchild,* as well as the cases cited in the original Petition at pages 14-21, flatly contradict Respondents' contention that the Sixth Circuit's holding is not in conflict with any other decision of any other court.

*Accord, In Re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977). As the authors conclude: "[T]he rule itself, by calling for the 'best notice practicable under the circumstances' and requiring that notice be given on an individual basis to identifiable members of the class, appears to have been drafted with this constitutional point in mind." Wright at 191. In essence, personal jurisdiction over Rule 23(b)(3) class members is only by consent. *Compare* FED. R. CIV. P. 4(k). That consent cannot be construed to allow claims against defendants who were never included in the notice provided to class members.

Finally, Respondent LeHill Partners' ("LeHill") desperate reliance on a brief authored in 1989 (for trial proceedings in Florida) cannot save their theory of implied jurisdiction.[14] LeHill's quote from that brief is quite cynically taken out of context. A final resolution in a properly certified class action arguably would have *res judicata* effect on those members of the class (who did not request exclusion) with regard to those issues actually litigated. What LeHill neglects to inform the Court, however, is that the proceedings in this case did not unfold as anticipated: there was a final resolution as to the class only in the limited SSG contract case binding only the SSG plaintiffs and the SSG defendants. There was no class certification in the *Becherer* proceedings against certain other defendants.[15] Thus, while the brief's author justifiably argued in 1989 that the judgment in the pending class action suit could feasibly bar further litigation, that prediction was premised on full class certification of all claims against all defendants. When the premise supporting the conclusion failed to come to fruition, the conclusion likewise failed.

## CONCLUSION

Review of this Petition is necessitated by the District Court's extensive disregard of Due Process and First Amendment Guarantees. The issues presented by the District Court's and Circuit Court's unprecedential extension of the theory of "virtual representation" are now fully framed and ripe for appellate review.

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[14] Initially, it should be noted that the brief LeHill relies on is not a part of the record in the instant case. Furthermore, the Florida appellate court did not rely on the quoted section in reaching its holding. *Dykes v. Trustbank Savings F.S.B.*, 567 So.2d 958 (Fla. App. 1990).

[15] See chart, Appendix B.

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DATED: September 12, 1995

No. 94-1968

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1994**

J. DON ADAMS, et al.,
*Petitioners,*

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
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## APPENDIX

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# APPENDIX
# TABLE OF CONTENTS

PAGE

Appendix A
Document Request To Thomas Grady . . . . . 1a

Appendix B
Chart . . . . . 1b

# APPENDIX A

Document Request To Thomas Grady

## DOCUMENT REQUEST TO THOMAS GRADY

Definitions and Instructions

A. **"Document"** shall include any information-bearing medium, including but not limited to paper, audio and videotape, photographic film, and any computer readable medium.

B. **"Counsel"** means Elwood Simon, Bruce Gerstein and/or Eugene Spector, any law firms with which they are or were associates, and any other lawyers employed by or otherwise associated with those firms.

C. **"Grady"** means Thomas Grady, any law firm with which he is or was associated, and any other lawyers employed by or otherwise associated with those firms.

D. **"The Litigation"** means *Becherer, et al. v. Merrill Lynch, Pierce Fenner and Smith, et al.*, Case No. 89-CV-75202-DT (the **"Becherer Lawsuit"**) or *Adams et al. v. Merrill Lynch, Pierce Fenner and Smith, et al.*, Case No. 92-2776-Co-01 (Collier County, Florida).

E. **"Named Plaintiffs"** means Richard C. Becherer, Lawrence M. Richard, Robert A. Horvath, Henry V. Denolf and Joann L. Denolf, individually or collectively.

F. **"AUO"** means the Association of Unit Owners of the Registry Hotel at Pelican Bay, Inc.

G. **"AUO" Board"** means the board of Directors of the AUO.

H. **"AUO Meeting"** means a formal or informal meeting or conference (whether in person or by telephonic or other means) of the AUO Board or any of its members, any committee or sub-committee of the AUO or the AUO Board (including any advisory committee or board), or the AUO membership.

I. **"Investigation"** means any investigation relating to the Registry Hotel at Pelican Bay conducted by, at the director of, or in cooperation with Counsel, including but not limited to the investigation referenced on the first page of the Complaint in the Becherer Lawsuit and the "Compliance Review" referenced at the August 14, 1989 AUO meeting.

J. If you object to furnishing any document requested herein on grounds of privilege or otherwise, identify each document withheld and the basis for withholding it.

## DOCUMENTS TO BE PRODUCED

1. Video or audio tapes, written transcripts, minutes or other record of any meeting referring or relating to the Investigation or the Litigation between Grady and:

a) any Unit Owner;

b) Counsel:

c) the AUO Board, any of its board members or officers, or its counsel.

2. Notes, memoranda or other documents which summarize or reflect any meeting referring or relating to the Investigation or the Litigation between Grady and:

a) any Unit Owner;

b) Counsel;

c) the AUO Board, any of its board members or officers, or its counsel.

3. Interim, draft or final reports, memoranda, correspondence and other documents summarizing or reflecting all or any part of the Investigation, including but not limited to:

a) Interim Report 1 prepared in December 1988;

b) the report of Counsel referenced in the May, 1989 AUO meeting; and

c) the "independent damage analysis" referenced at the May, 1989 AUO meeting.

4. Correspondence, reports, memoranda, notes, and other documents regarding or reflecting:

a) the decision to undertake the Investigation.

b) the subject matter, scope and conduct of the Investigation.

c) the decision to institute the Becherer Lawsuit.

d) the choice of forum for the Becherer Lawsuit.

e) the selection of parties plaintiff and defendant in the Becherer Lawsuit.

f) the decision to file the Becherer Lawsuit as a class action.

g) the selection of counsel to handle the Becherer Lawsuit.

h) the financing of the Litigation, including the payment of fees. costs and expenses associated with the Litigation.

i) the persons with authority to make decisions regarding the Becherer Lawsuit.

j) efforts, negotiations or proposals to settle all or a part of the Becherer Lawsuit.

k) the selection or compensation of experts, consultants, advisors or other persons who provided services in connection with the Investigation or the Becherer Lawsuit.

l) the status or progress of the Becherer Lawsuit.

5. Correspondence, memoranda, notes, and other documents transmitting or seeking review, comments or approval of pleadings or any other papers filed or proposed to be filed in or used in connection with the Becherer Lawsuit.

6. Drafts of pleadings or papers filed or proposed for filing in the Becherer Lawsuit.

7. Documents relating to the Investigation or the Litigation which reflect communications between:

a) any Unit Owner and the AUO, any AUO Board member or officer, or any attorney representing the AUO;

b) Counsel and the AUO, any AUO Board member or officer, or any attorney representing the AUO;

c) Grady and the AUO, any AUO board member or officer, or any attorney representing the AUO;

d) Grady and Counsel.

8. Documents relating to any foreclosure proceeding regarding any interest in the Registry Hotel which reflect communications between:

a) Counsel and the AUO, any AUO Board member or officer, or any attorney representing the AUO;

b) Counsel and Grady;

c) Grady and the AUO, any AUO Board member or officer, or any attorney representing the AUO.

9. Documents relating to any other lawsuit or arbitration proceeding relating to the Registry Hotel (other than the Litigation and the foreclosure proceedings referred to in the preceding Requests) which reflect communications between:

a) Counsel and the AUO, any AUO Board member or officer, or any attorney representing the AUO;
b) Counsel and Grady;
c) Grady and the AUO, any AUO Board member or officer, or any attorney representing the AUO.

10. Documents which reflect or relate to recommendations or advice given to any Unit Owner by any person other than Grady regarding the selection of counsel in connection with the foreclosure proceedings referred to in the preceding Requests.

11. The "monthly updates" referenced in Grady's February 21, 1992 memo to his "Registry Clients."

12. Correspondence, memoranda, reports and other documents relating to the Investigation or the Litigation which reflect or constitute communications between the AUO, Counsel, Grady, Quareles & Brady or any other attorneys, the AUO Board or any of its members and:
a) Arthur Anderson;
b) Coopers & Lybrand;
c) Stanley Blumin;
d) Grant Thornton;
e) Phillip Levin;
f) any other expert, consultants or advisor retained or providing service in connection with the Becherer Lawsuit.

13. Time records, summaries, billing slips, calendars, diaries or similar documents describing services provided in connection with the Investigation or the Litigation by Grady.

14. Cancelled checks, check registers, cash receipts journals or other documents reflecting amounts paid to Grady

by the AUO, any AUO Board member or officer, or any attorney representing the AUO in connection with the Investigation or the Litigation.

15. Cancelled checks, check registers, cash receipts journals or other documents reflecting amounts paid to Grady by Counsel or by Grady to Counsel in connection with the Investigation or the Litigation.

## APPENDIX B

Chart

| ACTION AND ISSUES: | PLAINTIFFS: | DEFENDANTS: |
|---|---|---|
| SSG CONTRACT ACTION ("Case I") (Decided After Bench Trial) | **SSG PLAINTIFFS** (includes entire certified class, including **Petitioners** and the named *Becherer Plaintiffs)* | Can-American Corporation, Can-American Realty Corporation, Shelter Seagate Corporation, Garrett G. Carlson, Graham C. Lount, and Arni Thorsteinson |
| FRAUD AND SECURITIES CLAIMS ("Case II") (Decided upon Defendants' Motion for Summary Disposition) | THE ***BECHERER*** PLAINTIFFS: Richard Becherer, Lawrence Milton Richard, Robert A. Horvath, Shirley Horvath, Henry Denolf and Joann Denlof. | **Merrill Lynch, Pierce Fenner & Smith, Incorporated;** Frank Lavin, Martin Cicco, Laventhol & Horwath, **Dominion Financial & Investment Corp., n/k/a Trustbank Mortgage Center, Inc.**, M.A. Mortenson Company, Winsor/Faricy Architects, Inc., and Midwest Title Guarantee Company of Florida |